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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. ~~100~~ 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA, also known as SPANISH LINE
and GARCIA & DIAZ, INC., and QUIN LUMBER CO.,
INC.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SILAS B. AXTELL,

Counsel for Petitioner,

15 Moore Street,

New York 4, N. Y.

Of Counsel:

NARCISO PUENTE, JR.,
60 Wall Street,
New York 5, N. Y.

CHARLES A. ELLIS,
37 Wall Street,
New York 5, N. Y.

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**PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Francisco Romero, a disabled Spanish sea-
man injured aboard a Spanish merchant vessel in Hoboken
Harbor, Hoboken, New Jersey, by reason of unseaworthi-
ness of the vessel and negligence of the shipowner and
three American corporations, and treated in an American
hospital, prays that a writ of certiorari issue to review
the judgment of the United States Court of Appeals for
the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court, South-
ern District of New York (R. 247-253a; Sugarman, D. J.)
printed in the Appendix hereto *infra*, page 40 is re-
ported in 142 F. Supp. 570 and 1956 A. M. C. 1579.

The *per curiam* opinion of the Court of Appeals for the Second Circuit (Hincks, Lumbard and Waterman, JJ.), printed in the Appendix hereto *infra*, page 47 has not yet been officially reported.

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered April 30, 1957.

The jurisdiction of this court is found in 28 U. S. C. A. Sec. 1254 (1) and 2101 (c).

Questions Presented

1. Whether under 28 U. S. C. Sec. 1331 the district court has and should exercise jurisdiction (a) of plaintiff's claims under the general maritime law of the United States and (b) of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688).

2. Whether (a) the general maritime law of the United States and (b) the provisions of Section 33 of the Jones Act (46 U. S. C. Sec. 688) apply to the tort where a foreign seaman employed on a foreign ship suffers injuries, due to unseaworthiness of the vessel and negligence of its owner, its American agent and American stevedores and carpenters, while the ship is tied up at a pier in the port of Hoboken, New Jersey, for unloading and reloading, and the plaintiff is treated for his injuries for eight months in St. Mary's Hospital, Hoboken, New Jersey.

3. Whether such questions are questions of merits, to be tried and determined only in *exercise* of a fastened jurisdiction, and cannot, on motion to dismiss for "lack

of jurisdiction of the subject matter", be changed from questions of merits into a question of jurisdiction and be tried and determined on such motion as a question of jurisdiction; and

Whether on such motion the District Court lacked authority to hear and determine the merits of a defense based on an alleged prior Spanish contract and the laws of Spain as allegedly affording plaintiff a sole remedy against his employer.

4. Whether the treaty with Spain and its partial abrogation pursuant to the mandate of the Seaman's Act of 1915, prior to enactment of Section 33 of the Jones Act as an amendment of said Seaman's Act, prevents or permits the Court to exercise jurisdiction in a case such as this.

5. Whether the election given by Section 33 of the Jones Act (46 U. S. C. Sec. 688) to "Any seaman" to maintain an action for damages at law with a right of trial by jury, and its incorporating the provisions of Section 5 of the Federal Employers Liability Act (45 U. S. C. Sec. 55) that "Any contract, rule, regulation or device whatsoever" to exempt a carrier from liability under the statute shall to that extent be void, preclude holding that the jurisdiction of the district court can be defeated by a prior contract to have claims for injuries sustained by the seaman controlled by the law of Spain.

6. Whether evidence offered by defendants, on their motions to dismiss for "lack of jurisdiction of the subject matter", either to refute allegations of the complaint as to ownership, management, operation or control of the vessel, or to establish alleged defenses of foreign law and prior agreement between plaintiff and the foreign shipowner to have claims for injuries sustained while in the

employ of such defendant controlled by the law of Spain, should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motion to strike the same; and whether the Court's findings based thereon should be reversed and stricken out.

7. Whether the district court, having jurisdiction of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688) and for unpaid wages, has and should exercise pendent jurisdiction of plaintiff's claims under the general maritime law of the United States against the same defendant, even if jurisdiction of such maritime law claims were otherwise lacking under 28 U. S. C. Sec. 1331.

8. Whether the district court has and should exercise jurisdiction under 28 U. S. C. Sec. 1332 of plaintiff's claims against the three American defendants by reason of diversity.

9. Whether the district court, if it lacked jurisdiction at law, has and should exercise jurisdiction in admiralty.

10. Whether it was error to dismiss for lack of jurisdiction of the subject matter the action of this disabled foreign seaman plaintiff (a) against the owner and operators of the foreign vessel for damages, maintenance and cure and unpaid wages, under the general maritime law of the United States and all statutes amendatory thereof, including specifically Sec. 33 of the Jones Act, and (b) against American third-party defendants for damages under the general maritime law of the United States.

Constitutional and Statutory Provisions Involved

The provisions involved of the United States Constitution (Art. III, Sec. 2, and Art. VI, cl. 2) and statutes (Judicial Code, 28 U. S. C. Secs. 1331, 1332, 1333, 1652;

Jones Act of June 5, 1920, ch. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. Sec. 688; and Federal Employers Liability Act of April 22, 1908, ch. 149, Secs. 1; 5, 35 Stat. 66, 45 U. S. C. Secs. 51, 55) are printed in the Appendix hereto, *infra*, pages 37-39.

Statement of the Case

Petitioner, a Spanish seaman and member of the crew of the Spanish S. S. Guadalupe was tragically injured on board the vessel while it was tied up at Pier No. 2, Hoboken, New Jersey on May 12, 1954, to unload passengers' baggage and take on cargo, and lumber for erecting shifting boards for grain cargo.

Petitioner's left leg was severed and his right leg broken with multiple fractures, in addition to other bodily injuries. At point of death he was placed in St. Mary's Hospital, Hoboken, New Jersey where he underwent treatment from May 12, 1954 until January 11, 1955 (R. 107a), a period of eight months.

No compensatory damages, compensation, maintenance and cure nor wages have been paid to petitioner or the hospital since the injury. The hospital bill of St. Mary's Hospital for \$3,750.60 remains unpaid, and a lien therefor was filed by the hospital against any recovery petitioner may secure in this action (R. 109a-110a). Other bills of Americans including that for an artificial limb for petitioner and for burial of the amputated part of his leg also remain unpaid.

Petitioner as plaintiff instituted an action at law against the Spanish corporate owner, Compania Trasatlantica, also known as Spanish Line (Compania) and three American corporations, Garcia & Diaz, Inc. (Garcia), International Terminal Operating Co. (International), and Quin Lumber Co., Inc. (Quin). A jury trial was demanded.

The amended complaint alleged that Compania and Garcia each owned, operated, controlled and managed the

136, 143, 144-146, in which Chief Justice Marshall distinguished the case of merchant vessels in our ports from that of foreign national ships of war. It emphasized the exclusive and absolute jurisdiction of the nation within its own territory and the full and complete power of the nation.

In the recent case of *William S. Girard*, decided July 11, 1957, and not yet officially reported, this Court cited *The Schooner Exchange v. McFaddon*, *supra*, in sustaining the jurisdiction of Japan to try an American soldier for the killing of a Japanese woman while he was on duty guarding, as a member of the American occupation forces in Japan, a machine gun and clothing at Camp Weir Range area, Japan. This was notwithstanding that American officials had originally claimed, under the provisions of the treaty with Japan, exclusive jurisdiction to try Girard and apply in his trial American law.

In *Wildenhus's Case*, 1887, 120 U. S. 1, 4-5, cited by this Court in *Uravic v. Jarka Co.*, *supra*, this Court considered a Belgian treaty, Article XI of which reserved less from its waiver of jurisdiction than does Article XXIII contained in the Spanish Treaty of 1903 (Treaty Series, No. 422, reprinted by the Government Printing Office in February, 1954).^{*} Article XI of the Belgian treaty involved in *Wildenhus' Case* provided:

"Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed" (120 U. S. 18).

The Spanish treaty of 1903 in Art. XXIII more broadly excepted from any treaty waiver of American jurisdiction any disorder which should happen on board a Spanish vessel in the territorial waters of the United States

"when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or

^{*} Art. VI and abrogated Art. XXIII of the Spanish Treaty of 1903 are printed in Appendix, *infra*, pages 47-48.

vessel, and that plaintiff was employed by each of said defendants. International had with Garcia a stevedoring contract to load and Quin a carpentering contract to make shifting boards for a grain cargo.

The amended complaint in four causes of action sought damages against the defendants Compania and Garcia under Section 33 of the Jones Act for negligence and under the general maritime law of the United States for unseaworthiness of the vessel (first cause), for maintenance and cure and unpaid wages (second cause), and for damages against all four defendants under the general maritime law of the United States.

The allegations showing unseaworthiness and negligence include the following:

(a) The wire cable on the boom winch was unseaworthy in that it was twisted and old, and unsuitable for the task assigned;

(b) The bosun of the S. S. Guadalupe negligently rushed Romero, and other members of the crew in the operation of lowering a boom prior to taking on the lumber;

(c) The said bosun negligently ordered an insufficient number of crew members to perform the operation in which Romero was hurt; and negligently ordered Romero's assistants away and permitted the winch to be started while he was shorthanded and there was nobody to supervise the work;

(d) The bosun was negligently called away from and negligently left the place where Romero was working, without providing proper supervision of the man operating the winch and a man to help Romero handle the metal lines;

(e) Garcia and International were negligent in causing the bosun to leave his post of supervising the topping of the boom;

serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew."

Such waiver of jurisdiction as Art. XXIII contained was in large measure abrogated on July 1, 1916, in accordance with provisions of the Seaman's Act of March 4, 1915 (38 Stat. 1164), to which Sec. 33 of the Jones Act of June 5, 1920, c. 250, Sec. 33 (41 Stat. 1007) was an amendment.

Article VI of the Spanish treaty also guarantees Spanish subjects "free access to the Courts . . . as well for the prosecution as for the defense of their rights."

It was against this background that Sec. 33 of the Jones Act was enacted, and the decision herein denying *jurisdiction* thus conflicts directly or in principle with such treaty provision, and conflicts in principle with this Court's decisions in *Wildenhus's Case*, *supra*, in *Uravic v. Jarka Co.*, *supra*, and in the *William S. Girard* case:

The first clause of Section 33 of the Jones Act, moreover, provides that:

"*Any* seaman who shall suffer personal injury in the course of his employment *may*, at *his* election, *maintain an action for damages at law*, with the right of trial by jury" (Italics ours.)

The quoted first clause would be wholly unnecessary if only American seamen were contemplated and if foreign seamen injured here and treated here were to be "intentionally excluded" (Cf. *Uravic v. Jarka Co.*, *supra*, 282 U. S. at 239).

In *Strathearn S.S. Co. v. Dillon*, 1920, 252 U. S. 348, 354, this Court said of the comparable wage statute provision opening the Federal Courts to foreign seamen:

* The wage statute originally had covered only "Every seaman on a vessel of the United States", the proviso being added to make it applicable to seamen on foreign vessels. By contrast, the Jones Act was comprehensive initially. Moreover, it does not involve "a domestic matter of contract" (*Uravic v. Jarka Co.*, *supra*, 282 U. S. 239).

(f) The stevedore and land carpenter employees of Garcia, International and Quin rushed the bosun and the crew members to have the boom lowered even with insufficient crew members on the operation;

(g) The land carpenters and stevedores, employees of Quin and International, twisted the boom winch wire by negligently throwing or kicking aside on the deck the wire previously laid out orderly by Romero;

(h) A carpenter or stevedore, in his attempt to aid Romero, tried to straighten out the twisted wire which Romero was feeding to the winch, but negligently failed to straighten or warn of a dangerous snarl in the wire which caused it to lose contact with the niggerhead;

(i) The menacing atmosphere created by the stevedores and carpenters toward the foreign crew members, including Romero, because they were doing an operation usually done by said stevedores and carpenters for additional pay, made the whole operation additionally dangerous.

Jurisdiction was alleged of the claims against Compania and Garcia as an action brought under the general maritime law of the United States and all statutes amendatory thereof including Section 33 of the Jones Act (R. 200a).

Jurisdiction was alleged of the claims against International and Quin as an action cognizable under the Constitution of the United States and the general maritime law of the United States (R. 202a, 204a).

Jurisdiction as to these defendants was also predicated on diversity of citizenship (R. 202a, 203a) and diversity also exists as to Garcia.

The four answers of all defendants (R. 207a, 211a, 216a, 20a) put in issue substantially all of the allegations of each of the four causes of action, the answers of Compania and Garcia pleaded as a defense a lack of jurisdiction of the subject matter (R. 214a; 219a); and the answer of Compania also pleaded as a defense that plaintiff's sole

"No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the courts of the United States, and, if it were the intention of Congress to limit the provisions of the act to American seamen, this feature would have been wholly superfluous."

See also:

Strathearn S.S. Co. v. Dillon—An Unpublished Opinion By Mr. Justice Brandeis, 69 Harvard L. Rev. 1177, 1179, 1189.

If American seamen only were to be included by the Jones Act, it would have been necessary only to enact a provision that the Federal Employers' Liability Act should apply to American seamen, and without enacting at all the quoted first clause. For 28 U. S. C. Sec. 1331, without more, would then afford any American seaman jurisdiction of an action at law based on such a statute; and in an action at law under Sec. 1331 the American seaman would be entitled to a jury trial. The Seventh Amendment of United States Constitution, indeed, would guarantee jury trial.*

But with reference to a foreign seaman injured here, and requiring hospitalization and treatment here, the affirmative provision that he "may, at his election, maintain an action for damages at law, with the right of trial by jury" is highly significant and apt. For in his case this provision is effective to enable him to elect between Jones Act rights and foreign law rights, and thus preclude the tortfeasors from defeating his action under the Jones

* It is significant that, by comparison, the Federal Employers' Liability Act itself contains no similar provision that the injured railway employee may at his election maintain an action for damages at law with a right of trial by jury—this, for the very obvious reason that he would have such right under 28 U. S. C. Sec. 1331 and the Seventh Amendment, once the liability provision, 45 U. S. C. Sec. 51, was enacted.

It is significant also that *Strathearn S.S. Co. v. Dillon* was decided March 29, 1920, just 68 days before the Jones Act was enacted on June 5, 1920, after adding Sec. 33 with its first clause equally unnecessary for American seamen.

rights were governed by an alleged Spanish contract and the laws of Spain and that plaintiff cannot maintain suit against it under the Jones Act or the general maritime law of the United States and that plaintiff's sole remedy must be asserted in Spain or before a representative of the Spanish government (R. 214a-215a).

Contested discovery proceedings were had preparatory for trial (*Romero v. International, etc.*, 1955 A. M. C. 1814).

Motion, Pretrial and Decisions Below

When the action was called and assigned for trial a motion was made by defendants to dismiss the complaint for "lack of jurisdiction of the subject matter."

The district judge thereupon conducted a pre-trial hearing on this motion and repeatedly asserted that it was confined to such motion (R. 97a; 117a; 194a). In the conclusion of the hearing the court stated:

"The Court: . . . However, so there will be no misunderstanding, I am proceeding on the basis that each of the four defendants has moved orally, which brought on this pretrial hearing, for a dismissal of the complaint upon the ground of *lack of jurisdiction of the subject matter*.

Mr. Quinlan: *That is right.*

The Court: *And those are the motions I am going to decide*" (R. 194). (Italics ours.)

Over petitioner's objections (R. 8a, 19a-22a, 87a, 97a-103a, 176a) and subject to motion by petitioner to strike out the evidence (R. 104a-106a, 173a, 176a-177a), the Court, nevertheless, received evidence relating to the relationship between Compania and Garcia or its partnership predecessor all commencing in 1935 and with reference to the management, operation and control of the vessel, and evidence under the fourth defense of Compania based on allegations of Spanish contract and Spanish law.

Over objection and motion to strike the court received in evidence a contract signed by Romero for a previous

Act by pleading as defense a different right and remedy under foreign law or foreign contractual provisions.

Petitioner submits, moreover, that in every sense the case at bar on the merits is one involving torts which "go beyond the scope of discipline and private matters that do not interest the territorial power" (*Uravic v. Jarka Co.*, *supra*, 282 U. S. 240), and which are of intense interest to the territorial power and its citizens and are consequently within its Jones Act legislation.

The injury to petitioner herein was sustained during unloading operations while the vessel was tied up at a pier in Hoboken, New Jersey; *i. e.* while "in a practical sense, the ship . . . was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore", and "was due to hurried and imprudent unloading" (Cf. *The Germanic*, 1905, 196 U. S. 589, 597, 595).

Petitioner's left leg was severed and his right leg broken during the unloading operations on board the vessel while it was tied at the American pier, with American workmen as well as Spanish crew members aboard ship and involved in the tort. The injury and loss of blood placed petitioner at the door of death here in an American port. Spain or Spaniards could not save his life. An American ambulance rushed to the ship, took charge of petitioner and rushed him to an American hospital, under protection enroute of American health, traffic and police regulations.

He then was treated for eight months in an American hospital; the services of American physicians, American surgeons and American nurses were required; it was necessary to obtain an artificial limb from an American source; and his amputated leg was buried in an American cemetery.

Of necessity, the American Government itself was obliged to take an interest. In order to permit extended American hospitalization essential to save the seaman's life, it was

round trip voyage notwithstanding that it was limited by its terms to that previous voyage, and that no contract was signed for the voyage on which the accident occurred.

Over objection and motion to strike the court heard the testimony of a foreign law expert for the defendant steamship company, and (without prejudice to petitioner's objections and motion to strike) a contrary opinion of a foreign law expert for the plaintiff, respecting the effect of the said contract and Spanish law, and made a finding that under the law of Spain, when the seaman remained in the employ of the ship during subsequent voyages the subsequent service was under the terms and conditions of the original written contract, a finding that an injured Spanish Seaman has an exclusive Workmen's Compensation remedy under Spanish law, and a finding that Garcia was solely an agent for husbanding the vessel.

It was "On the basis of the foregoing" found facts in its opinion that the court turned "to the question of jurisdiction in this court to entertain the action" (R. 251a, Appendix, *infra*, p. 44). It held that "The possible bases of jurisdiction are four: (1) the Jones Act; (2) a Federal question; (3) diversity; (4) discretionary, under the general maritime law; the first three on the law side with a trial by jury, the fourth in admiralty with a trial to the court" (R. 251a; Appendix, *infra*, p. 44).

It ignored the question of jurisdiction of the claim for unpaid wages, and the question of pendent jurisdiction.

As to Jones Act jurisdiction, citing *The Paula*, 2d Cir. 1937, 91 F. 2d 1001, *Paduano v. Yamashita*, 2d Cir. 1955, 221 F. 2d 615 and *Gambera v. Bergoty*, 2d Cir. 1942, 132 F. 2d, 414, cert. den. 319 U. S. 742, and ignoring this Court's decision in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, the district court held that "It is settled in this circuit" that an alien seaman cannot sue under the Jones Act for injury suffered while the ship is in an American port and that "Accordingly, the plaintiff's action against the defendant Compania under the Jones Act must be dis-

missed." As respects Garcia, the Court, citing *Cosmopolitan Shipping Co. v. McAllister*, 1949, 337 U. S. 783, 790, held that "plaintiff's Jones Act claim against this defendant must also be dismissed" in light of the court's finding that the defendant Garcia was solely an agent for husbanding the vessel. Notwithstanding that the pre-trial hearing was asserted to be on the question of jurisdiction only, the district court stated, in its opinion that:

"There was *no proof adduced at the pretrial hearing* of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. *Nor did plaintiff offer any proof of any negligent act* by defendant Garcia within the scope of the agency, contributing to his injury." (Italics ours.)

It thus treated the *jurisdiction* motion and hearing as though it were a trial of the merits, but without affording plaintiff an opportunity to try the merits.

As respects "Jurisdiction because of a federal question" the district court, citing *Paduano v. Yamashita, supra*, and *Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir. 1956, 234 F. 2d, 253, held that "It is similarly established *in this circuit* that the facts herein present no federal question."

As respects jurisdiction because of diversity the district court, citing a Southern District court decision in *Tsitsinakis v. Simpson, Spence and Young*, S. D. N. Y., 90 F. Supp. 578, held that necessary diversity is lacking because plaintiff and defendant Compania are both subjects of Spain.

As respects discretionary jurisdiction in admiralty—which plaintiff did not plead—the court, citing a Southern District court decision, *Nakken v. Fernley and Egger*, S. D. N. Y., 137 F. Supp. 288, held that in light of its findings as to Spanish law the court would decline jurisdiction in admiralty even as a matter of discretion and that "the defendants' motions are granted and the complaint herein is dismissed."

On appeal by plaintiff the Court of Appeals for the Second Circuit affirmed on the opinion of the District Court.

Notwithstanding that the amended complaint in the second cause of action pleaded a failure by defendants "to pay him wages to the end of the voyage" (R. 201a), and that this was argued in both courts, neither the District Court nor the Court of Appeals mentioned this in dismissing the complaint for lack of jurisdiction. Petitioner had cited in both courts this Court's decision in *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 348, holding that our wage statutes are specifically applicable to seamen on foreign vessels while in harbors of the United States, and that by statute the courts of the United States are open to such seamen for their enforcement.

Both the District Court and the Court of Appeals also failed to consider the question of pendent jurisdiction, fully argued by petitioner in both courts.

Reasons for Allowance of the Writ

I

Basic questions reserved by this Court, and the lower Courts' desire that this Court review and settle them.

This court has never decided but has noted and reserved for decision the two great questions

(1) whether the District Court under 28 U. S. C. Section 1331 has jurisdiction of an action based on the general maritime law of the United States as one which "arises under the Constitution, laws, or treaties of the United States" (see *Pope & Talbot v. Hawn*, 1953, 346 U. S. 406, 410, footnote 4; and see "II", *infra*, pp. 12-19); and

(2) whether Section 33 of the Jones Act is applicable when an alien seaman is injured on a foreign vessel in an American port (see *Plamals v. Pinar del Rio*, 1928, 277 U. S. 151, 155; *Uravic v. Jarka*, 1931, 282 U. S. 234; *Lauritzen v. Larsen*, 1953, 345 U. S. 571; and see "III", *infra*, pp. 20-26).

During the pre-trial hearing herein the District Court stated, with reference to both these questions that "until the Supreme Court finally speaks we are never going to know . . . I only wish that the day would come. This may be the agency for getting the Supreme Court to speak once and for all" (R. 99a). See also: *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2d Cir., 1955, 221 F. 2d 615, 617.

A writ should be granted to review these and the other important questions hereinabove stated, presented by the decisions made below, and hereinafter discussed, and to resolve the conflicts in decisions with respect thereto.

II

The unresolved question and conflicting decisions as to jurisdiction of claims based on the general maritime law of the United States.

1. There is conflict and difference of opinion in three circuits as to whether the District Court has jurisdiction under 28 U. S. C. A. Sec. 1331 of the subject matter of a civil action based on the general maritime law of the United States; in other words, whether a controversy which arises under the general maritime law of the United States is one which "arises under the Constitution, laws, or treaties of the United States." One Circuit says "Yes"; two Circuits say "No."

Jurisdiction has been sustained by the First Circuit Court of Appeals in *Doucette v. Vincent*, 1st Cir., 1952, 194 F. 2d 834, and *Jansson v. Swedish American Line*, 1st Cir., 1950, 185 F. 2d 212.

Jurisdiction has been denied by the Third Circuit Court of Appeals in *Jordine v. Walling*, 3rd Cir., 1950, 185 F. 2d 662, and by the Second Circuit in *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2d Cir., 1955, 221 F. 2d 615, and in the case at bar. See also *Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir., 1956, 234 F. 2d 253.

The conflict between the First and Third Circuits was noted by this Court in *Pope & Talbot Inc. v. Hawn*, 1953, 346 U. S. 406, 410, footnote 4, where, because of diversity sufficient to support jurisdiction, this Court said:

"In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U.S. Code, sec. 1331 as arising 'under the Constitution, laws or treaties of the United States.' See *Doucette vs. Vincent*, 194 F. 2d. 834 and *Jansson vs. Swedish American Line*, 185 F. 2d. 212 Cf. *Jordine vs. Walling*, 185 F. 2d. 662."

In the *Paduano* case, the Second Circuit disagreed with the First Circuit, and disagreed with the reasoning while agreeing with the result in the Third Circuit case; and specifically stated that "*the conflict must ultimately be resolved by the Supreme Court*" (221 F. 2d 617). (Italics ours.)

In the case at bar the lower courts cited and relied on the *Paduano* case; and the conflict in the three circuits is now presented for determination by this Court.

2. The case also conflicts in principle with *Erie R. R. Co. v. Tompkins*, 1938, 304 U. S. 64, interpreting the term "laws of the several states" in 28 U. S. C. Sec. 1652,*

* One commentator (*The Extension of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory* (1952), 66 Harvard L. Rev. 315, 324) has stated that:

"The authorities cited by the *Jordine* case to support its position simply do not establish or even imply that 'laws' in Section 1331 excludes decisional law, and there appear to be no holdings elsewhere to that effect. It may, however, be significant that *Erie R. R. v. Tompkins* interpreted the word 'laws' in another statute to include decisional law."

Another commentator five years earlier (*The Tangled Seine: A Survey of Maritime Personal Injury Remedies* (1947), 57 Yale L. J. 243, 245), had said of *Southern Pacific Co. v. Jensen*, 1917, 244 U. S. 205, that:

"The case represents the *Erie v. Tompkins* of the admiralty field except that the shoe is on the other foot, the state courts being obliged to follow 'substantive' law as declared by the Supreme Court, but left free to apply their own 'procedure'."

and with *Warren v. U. S.*, 1951, 340 U. S. 523, interpreting the term "national laws" in Art. 2, par. 2 of the Ship-owners Liability Convention (54 Stat. 1693).

In those cases this court held that such provisions include unwritten as well as written law, whether legislative or Court-made, saying in *Warren v. U. S.*, *supra*, that:

"The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts" (340, U. S. 526).

And that:

"Much of this body of maritime law had developed through the centuries in judicial decisions" (340 U. S. 527).

We submit that the term "laws of the several states" in 28 U. S. C. Sec. 1652 and the opposite term "laws of the United States" in 28 U. S. C. Sec. 1331 are comparable and complementary terms in the Judicial Code, and that, equally as held of the Section 1652 term "laws of the several states" in *Erie R.R. Co. v. Tompkins*, the term "laws of the United States" in Section 1331 includes decisional law, whether originally antedating and incorporated by the Constitution, or subsequently established by controlling decisions of this Court.

3. In the *Paduano* decision and this case, the lower courts also failed to note the difference between the comprehensive and unqualified term "laws of the United States" in the jurisdiction provisions of Art. 3, Sec. 2 of the Constitution, which 28 U. S. C. A. Sec. 1331 employs, and the qualified term "laws of the United States, which shall be made in pursuance thereof," in the supremacy provision of Art. 6 of the Constitution, which sec. 1331 does not employ. It thus conflicts in principle with *The*

Mayer v. Cooper, 1867, 6 Wall. (73 U. S.) 247, 253, where this Court said:

"The decisions of the courts of the United States within their sphere of action, are as conclusive as the laws of Congress made in pursuance of the Constitution."

4. As this court has frequently held, the substantive general maritime law of the United States is a part of the laws of the United States.

The Lottawanna, 1874, 21 Wall. (88 U. S.) 558, 573, 576;

Knickerbocker Ice Co. v. Stewart, 1920, 253 U. S. 149, 160;

Carlisle Packing Co. v. Sandanger, 1922, 259 U. S. 255, 259;

Panama Railroad Co. v. Johnson, 1924, 264 U. S. 375, 385, 386;

Utavic v. Jarko Co., 1931, 282 U. S. 234, 240;

Garrett v. Moore McCormack Co., 1932, 317 U. S. 239, 245, 246;

O'Donnell v. Great Lakes Dredge & Dock Co., 1943, 318 U. S. 36, 40;

Swanson v. Mara Brothers, 1946, 328 U. S. 1;

Seas Shipping Co. v. Sieracki, 1946, 328 U. S. 85, 88;

Pope & Talbot Inc. v. Hawk, 1953, 346 U. S. 406, 409.

As said in *The Lottawanna*, *supra*:

"Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as *its own law*, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime

law of the particular nation that adopts it. And without such voluntary adoption it would not be law

"To ascertain, therefore, what the maritime law of this country is, . . . The decisions of this court . . . are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed." (21 Wall 573, 576.) (Italics ours.)

In *Knickerbocker Ice Co. v. Stewart*, *supra*, this Court said:

"The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction" (253 U. S. 160).

While, therefore, as distinct from *proceedings* in admiralty, "*Proceedings* in a suit at common law . . . are precisely the same as in suits . . . not regarded as maritime, *wholly irrespective* of the fact that the injured party might have sought redress *in the admiralty*" (*The Belfast*, 1868, 7 Wall. (74 U. S.) 624, 645); it is now well settled that in such a case the substantive general maritime law of the United States must be applied, for the simple reason that it is the substantive law of the United States, whether the civil action be in a State court (*Garrett v. Moore McCormack*, *supra*, 1942, 317 U. S. 239, 245; 246) or on the law side of the United States District Court (*Pope & Talbot, Inc. v. Hawn*, 1953, 346 U. S. 406, 490; *Seas Shipping Co. v. Sieracki*, *supra*, 1946, 328 U. S. 85, 88).

The substantive general maritime law of the United States is, therefore, equally a part of the "Constitution, laws, or treaties of the United States" within the jurisdictional provisions of 28 U. S. C. Sec. 1331, as are any other provisions of substantive Federal law.

5. It was solely because original jurisdiction was not granted by Congress to the Federal Courts in cases arising under the Constitution or laws of the United States until the Act of March 3, 1875,* 18 Stat. c. 137, page 470, that prior thereto this Court held that the only remedy at law in federal courts in actions involving the maritime law was in diversity cases. See *The Belfast*, *supra*, 1868, 7 Wall. (74 U. S.) 624, 243, 644; *Leon v. Galceran*, 1870, 11 Wall. (77 U. S.) 185, 188; and *Steamboat Co. v. Chase*, 1872, 16 Wall. (83 U. S.) 522, 533, all decided before the Act of 1875.

But in *The Belfast*, *supra*, this Court said, respecting the saving clause, in what is now 28 U. S. C. Sec. 1333:

“Observe the language of the saving clause under consideration. It is to *suitors*, and *not* to the State Court nor to the Circuit Courts of the United States. Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy” (7 Wall. (74 U. S.) 644).. (Italics ours.)

Similarly both in *Leon v. Galceran*, *supra*, and *Steamboat Company v. Chase*, *supra*, this court said:

“He may have an action at law in the case supposed either in the Circuit Court or in a State Court, because the common law, in such a case, is competent to give him a remedy, and wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to

*The Sixth Congress in 1801, 2 Stat. c. 4, pages 89-100, in sec. 11, page 92, had granted such jurisdiction to the Circuit Court; but this had been repealed by the Seventh Congress in 1802, 2 Stat., c. 8, page 132, without application thereof in the Courts.

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suitors by the saving clause contained in the Ninth Section of the Judiciary Act" (11 Wall. (78 U. S.) 188, and 16 Wall. (83 U. S.) 533). (Italics ours.)

This language applies equally now to the remedy given by 28 U. S. C. Sec. 1331, as to the diversity remedy given by section 1332.

For the *saving clause* even as originally worded *did not specify diversity* but specified rather "a common law remedy where the common law is competent to give it"; and the present *saving clause*, 28 U. S. C. Sec. 1333, *does not specify diversity* but specifies rather "*all other remedies to which they are entitled.*" And the remedy by reason of the action being based on the substantive maritime law of the United States is now equally as available under 28 U. S. C. Sec. 1331, as is the remedy based on diversity under Sec. 1332. The *Paduano* argument respecting removability is as uncontrolling respecting cases under Sec. 1331 as it was of cases under Sec. 1332.

6. The Court of Appeals in *Paduano* misinterpreted the significance of the quoted statement made by Senator Carpenter when the Act of 1875 was before Congress (Hart & Wechsler, *The Federal Courts and the Federal System*, p. 75), that:

"The act of 1789 did not confer *the whole power which the Constitution conferred*; it did not do what the Supreme Court has said Congress ought to do, it did not perform what the Supreme Court has declared to be the duty of Congress. *This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.*" (Italics ours.)

Cases such as *Cohens v. Virginia*, 1821, 6 Wheat. (19 U. S.) 264, 378; *Osborne v. U. S. Bank*, 1824, 9 Wheat. (22 U. S.) 738, 821 and *Garrett v. Moore McCormack*, *supra*, 1942, 317 U. S. 239, 245, 246, show that the Constitution extended the Federal judicial power, including this Court's

power of review in Federal maritime law cases in State Courts (*Garrett v. Moore McCormack, supra*), to all cases involving substantive Federal law. Hence, Senator Carpenter's statement shows that Section 1331—giving to the District Courts "nothing less" than the Constitution authorized—now gives the District Court original jurisdiction at law in any case based on the substantive general maritime law of the United States.

7. The *Paduano* decision also does not properly interpret but conflicts in principle with *American Insurance Co. v. Canter*, 1828, 1 Peters (26 U. S.), 511 and with *The City of Panama*, 1879, 109 U. S. 453, and the distinction between cases of admiralty and maritime "*jurisdiction*", and cases arising under the Constitution and laws of the United States.

The Federal District Courts on the law side, alike with the State courts, cannot exercise admiralty and maritime "*jurisdiction*", i.e., jurisdiction "*in admiralty*", as distinct from "*all other remedies*" saved by 28 U. S. C. Sec. 1333 to "*suitors in all cases*". But where the matter in controversy is one based on the substantive maritime law of the United States, which, if brought in a State Court would be reviewable by this Court as one arising under the Constitution, laws or treaties of the United States, the Federal District Courts now have original jurisdiction thereof under 28 U. S. C. Sec. 1331, if such matter in controversy also exceeds the sum or value of \$3,000.00.

8. This important question of jurisdiction under 28 U. S. C. Sec. 1331, upon which the Circuits are now in conflict, affects claims of plaintiff against all of the defendants, including (1) his claims against the owner and operators of the vessel for unseaworthiness, maintenance and cure and unpaid wages, and (2) his claims against the third-party defendants for their negligence. A writ should be granted to resolve the conflict and settle this important question, as well as in the interests of justice.

III

The unresolved question and conflicting decisions as to Jones Act applicability to a tort on a foreign ship in an American port and foreign law defenses thereto.

The great question under the Jones Act reserved by this Court in *Plamals v. Pinar del Rio*, 1928, 277 U. S. 151, 155,* *supra*, and undetermined in either *Uravic v. Jarka*, 1931, 282 U. S. 234, *supra*, or in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, *supra*, this Court stated as follows:

“whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters” (277 U. S. 155).

That question is a principal “subject matter” of the action against Compania and Garcia; and a writ should be granted to review the decision which in dismissing the complaint for “lack of jurisdiction of the subject matter” has predicated such dismissal on a determination of that question.

The very reservation of that question in *Plamals v. Pinar del Rio*, *supra*, is indicative of its importance and substantial character and that it is a question which this Court should review and settle if reached herein.**

* *Plamals v. Pinar del Rio*, 1928, 277 U. S. 151, 155, *supra*, was the first case to reach this court involving a Jones Act claim of an alien seaman injured on a foreign vessel in the United States. A seaman on a British vessel sued *in rem* under the Jones Act. The District Court dismissed the libel at trial on the theory that the Jones Act was inapplicable and the British Compensation law applied. But this Court held instead that the Jones Act did not provide a lien enforceable by *in rem* proceedings; and this Court specifically left open the question whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters (277 U. S. 155).

** Petitioner submits that determination of such question involves an *exercise* of jurisdiction. See “IV”, pages 26-30, *infra*.

The question was in part decided three years later in *Uravic v. Jarka Co.*, 1931, 282 U. S. 234, *supra*, when this court reversed the New York Court of Appeals and held a defendant employer liable under the Jones Act for death of a stevedore on a German vessel tied up at an American port. The court distinguished the case of public armed vessels and, pointing to the fact that, as in *Wildenhus's Case*, 1887, 120 U. S. 1, crimes committed on private vessels are punishable by the territorial jurisdiction, said:

"We see no reason for limiting the liability for *torts* committed there when they go beyond the scope of *discipline* and private matters that *do not interest* the territorial power" (282 U. S. 240). (Italics ours.)

The Court rejected an argument that the venue clause and the lack of a lien "shows that seamen on a foreign vessel were not contemplated", saying:

"But the question is not whether they were thought of for the purpose of inclusion, but *whether they were intentionally excluded from a description that on its face includes them* . . . If the rule is wise there is no reason why it should not be universal. Wise or not, it is law and the question is why general words should not be generally applied. What would be the alternative? Hardly that the German law should be adopted. *It always is the law of the United States that governs within the jurisdiction of the United States*, even when for some special occasion this country adopts a foreign law as its own" (282 U. S. 239, 240). (Italics ours.)

Uravic v. Jarka Co., *supra*, is thus indicative, but without fully deciding, that the Jones Act applies to an injury to a seaman on a foreign vessel within the waters of the United States.

In *Uravic v. Jarka Co.*, this Court cited *The Schooner Exchange v. McFaddon*, 1812, 7 Cranch (11 U. S.), 116,

deemed necessary by immigration officials to reclassify petitioner to permit him to remain here to undergo hospitalization, and then to prosecute his claims to damages, instead of requiring him to depart as a foreign seaman within twenty-nine days after arrival, as would have been the case except for his tragic injury and extended and expensive treatment necessitated here. Both this and the prosecution of plaintiff's claims for damages have required the extended services of American attorneys for petitioner.

The bill of the American hospital for \$3,750.60, as well as bills of other Americans for medical services, for the artificial limb, and for the American burial of his amputated leg, all remain unpaid, and are liens on plaintiff's claims against defendants herein. All these items, owing to Americans and remaining unpaid, are part of the damages sought to be recovered in the American courts. Petitioner's American attorneys also are unpaid.

Three American companies, whose employees were on board the vessel and are charged with negligence, are defendants in the action.

*The tort and its consequences thus are in every sense American, and within the Act both literally and as construed in *Uravic v. Jarka Co.*, supra; and on that point the decision herein violates the statute, the principles of international law and treaty provisions, and conflicts in principle with the *Uravic* case.*

IV

The court's failure to distinguish between jurisdiction and merits, depriving petitioner of his right to a trial of the merits in the manner prescribed by law.

This court has repeatedly held that a complaint which sets forth a substantial claim under a federal statute presents a case within the jurisdiction of the District Court, as

a federal court; that there is a fundamental distinction between the question of jurisdiction and the question of merits; that such jurisdiction cannot be made to stand or fall upon the way the court may decide the legal sufficiency of the facts alleged or the legal sufficiency of facts proven; and that its decision either way upon either question "is predicated upon the *existence* of jurisdiction, not upon the *absence* of it."

Binderup v. Pathe Exchange, 1923, 263 U. S. 291, 305, 306;

The Fair v. Kohler Die & Specialty Co., 1913, 228 U. S. 22, 25;

Bell v. Hood, 1946, 327 U. S. 678, 681, 682;

Alma Motor Co. v. Timpkin Detroit Axle Co., 1946, 329 U. S. 129, 130;

Swafford v. Templeton, 1902, 185 U. S. 487, 491, 493, 495;

Huntington v. Laidley, 1900, 176 U. S. 688;

Louisville Trust Co. v. Knott, 1903, 191 U. S. 225, 233;

Public Service Co. v. Corboy, 1919, 250 U. S. 153, 162-163;

Smithers v. Smith, 1907, 204 U. S. 632, 645;

Barry v. Edmunds, 1886, 116 U. S. 550, 565;

Wetmore v. Rymer, 1898, 169 U. S. 115, 122, 128.

In *Bell v. Hood*, *supra*, 1946, 327 U. S. 678, 681, 682, reversing both lower courts and sustaining jurisdiction on the plaintiff's complaint, this Court held that "the district court must look to *the way the complaint is drawn* to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." This Court further said that:

"Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact *it must be decided after and*

not before the court has assumed jurisdiction over the controversy. If the Court does *later exercise* its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the *merits*, not for want of jurisdiction.” (Italics ours.)

In *Smithers v. Smith*; *supra*, 1907, 204 U. S. 632, 645, this Court reversing a dismissal, disapproved of trying “part of the controversy” on jurisdictional hearing (204 U. S. 644), and said:—

“For it must not be forgotten that where in good faith one has brought into court a cause of action, which, *as stated by him*, is clearly within its jurisdiction, *he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind.* This was clearly stated by Mr. Justice Matthews in *Barry v. Edmunds*, 116 U. S. at page 565. . . .” (Italics ours.)

In *Binderup v. Pathe Exchange*, *supra*, 1923, 263 U. S. 291, 306, this Court said:

“*Jurisdiction*, as distinguished from *merits*, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit.”

The question carefully reserved by this Court in *Plamals v. Pinar del Rio*, *supra*, 1928, 277 U. S. 151, 155, and undetermined in either *Uravic v. Jarka Co.*, *supra*, or *Lauritzen v. Larsen*, *supra*, certainly is not frivolous.

In *Panama Railroad Co. v. Johnson*, 1924, 264 U. S. 375, 383-384, this court, affirming a judgment for plaintiff after trial before a jury, specifically held that an action under Section 33 of the Jones Act was within the jurisdictional

provisions of old Section 24 of the Judicial Code, now 28 U. S. C. Sec. 1331.

The Court also said of the Jones Act that:

"The statute extends territorially as far as Congress can make it go" (264 U. S. 392).

In the same year, in *Stewart v. Pacific Steam Navigation Co.*, 3 F. 2d 329, 1924 A. M. C. 1272, Judge Learned Hand denied a motion to set aside the service of the summons in an action by a British seaman for injury sustained on the deck of a British vessel while it was passing through the Panama Canal.

In *Arthur v. Compagnie Generale Transatlantique*, 5 Cir., 1934, 72 F. 2d 662, the Fifth Circuit Court of Appeals reversed a District Court judgment which had dismissed for lack of jurisdiction an action under the Jones Act by a stevedore of unpleaded nationality, for injuries on a French vessel while discharging cargo in the harbor at Cristobal, Canal Zone, saying that "the right of action is given to all seamen regardless of nationality. Since the action arises under a law of the United States, diversity of citizenship is immaterial" (72 F. 2d 664).

The decision herein conflicts in principle with the foregoing decisions.

Recently in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, *supra*, this Court reviewed both the question of jurisdiction and the merits after plaintiff, a Danish seaman, injured on a Danish vessel while in Cuban waters, had obtained after a full trial a judgment for damages under the Jones Act. This court reversed the lower Court's determination of the merits, and held that the Jones Act did not apply to a tort on a Danish vessel in Cuban waters. It rejected a "place of contract" factor, saying:

"But a Jones Act suit is for tort" (345 U. S. 548).

But in *Lauritzen v. Larsen*, *supra*, this Court did *not* determine whether the Jones Act applies to an injury to an alien seaman on a foreign vessel in an *American* port. And as respects *jurisdiction*, even where the injury occurred on a foreign ship in Cuban waters, *this Court specifically sustained jurisdiction of the District Court*, and said:

"The question of jurisdiction is shortly answered . . . A cause of action under our law was *asserted* here" (345 U. S. 574-575).

Since jurisdiction was sustained in *Lauritzen v. Larsen*, *supra*, 1953, 345 U. S. 571, even where the claim was by an alien seaman for a tort on a foreign vessel in *foreign* waters; and since that case did not purport to decide the question of merits left open in *Plamals v. Pinar del Rio*, *supra*, 1928, 277 U. S. 151, 155, and not settled by *Uravic v. Jarka Co.*, *supra*, whether the Jones Act applies when a foreign seaman employed on a foreign ship is injured in *American* waters, it clearly was error in the case at bar to dismiss the action for "lack of jurisdiction of the subject matter." The Court has and must first *exercise* jurisdiction of the subject matter in order to determine that question of merits.

V

Evidence on the merits should not have been admitted, and should have been stricken out; and the findings based thereon should be set aside.

Petitioner submits further that for the foregoing reasons, the evidence offered respecting such alleged contract and the law of Spain should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motions to strike the same, and that the findings based thereon should be set aside as clearly erroneous.

In *The Fair v. Kohler Die & Specialty Co.*, 1913, 228 U. S. 22, 25, *supra*, the court specifically distinguished in this respect the jurisdictional question when jurisdiction is rested on the plea of a federal statutory cause of action, and the jurisdictional issue where jurisdiction is rested on diversity of citizenship. In the latter case *diversity* jurisdiction may be defeated by a plea of the citizenship of the parties, and a pre-trial hearing thereon with evidence taken and findings made as to the jurisdiction issue of *diversity*. But this court specifically held that, by contrast, "*when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim.*"

The decision herein overruling plaintiff's objection to the course pursued and the taking of evidence on the merits and denying plaintiff's motion to strike the testimony and exhibits (R. 247a; plaintiff's claim of surprise, R. 8a; objections, R. 19a-22a; exception, R. 22a; objections, R. 87a; exception, R. 88a; objections R. 97a-103a, 176a; exception 176a; motion to strike, R. 104a-106a, 173a, 176a-177a) thus conflicts either directly or in principle with this Court's decision in *The Fair v. Kohler Die & Specialty Co.* and other decisions herein above cited page 27, *supra*.

The District Court referred to 5 Moore's Federal Practice, 2d Ed. pages 38, 36 (R. 41a-42a, 247a) which, however, relates to an issue of jurisdiction "*such as diversity*"; and this points up the error of the lower courts in failing to apply herein the distinction specifically made by this Court in *The Fair v. Kohler Die & Specialty Co.*, *supra*.

The evidence taken herein also was improper and the findings made thereon are clearly erroneous because the contract offered and admitted covered only a prior voyage and not the voyage here involved.

Moreover, since the Jones Act incorporates the Federal Employers Liability Act, the injured seaman also has

the benefit of Section 5 of the Federal Employers Liability Act (45 U. S. C. Sec. 55), which provides that:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Construing such Section 5, this court has held in *Phila. B. & Wash. R. Co. v. Schubert*, 1912, 225 U. S. 603, 613, that "the purpose or intent" mentioned do not refer simply to an actual intent of the parties to circumvent the statute, but that the purpose and intent of the contract or regulations "is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."

In *Duncan v. Thompson*, 1942, 315 U. S. 1, 6, this court held that "Congress wanted Section 5 to have the full effect that its phraseology implies."

Construing together the Jones Act election right (46 U. S. C. Sec. 688), and this incorporated provision of Sec. 5 of the Employers' Liability Act (45 U. S. C. Sec. 55), it is clear on the merits that "Any seamen" entitled to the benefits of the Jones Act and electing to sue thereon cannot be deprived of the benefits thereof by any advance contract, rule, regulation, or device to have the law of a foreign country apply instead, and that any such contract provision is invalid and inadmissible in a Jones Act action.

The issue whether defendant Garcia is liable under the Jones Act, or is a husband of the ship who could not be liable as employer under the Jones Act, petitioner submits, is also an issue of merits which cannot properly be heard, tried and determined on a motion to dismiss for "lack of jurisdiction of the subject matter"; and the evidence and findings thereon should be stricken out. In view of the extraordinary circumstances alleged, this issue

cannot be determined without the court exercising jurisdiction and trying the case on the merits before a jury.

The lower courts' decision herein as respects Garcia, is not in accord with but conflicts in principle with *Cosmopolitan Shipping Co. v. McAllister*, 1949, 337 U. S. 783, relied on by the Court (R. p. 252a; Appendix, *infra*, p. 45), and with *Fink v. Shepard S. S. Co.*, 1949, 337 U. S. 810; and *Weade v. Dichmann, Wright & Pugh, Inc.*, 1949, 337 U. S. 801, simultaneously decided therewith. *Cosmopolitan Shipping Co. v. McAllister*, was decided as a determination of the merits after full trial of the case and verdict by a jury. It involved a general shipping agent of the United States Government under a war shipping contract subject to the War Shipping Administration (Clarification) Act, 57 Stat. 45, 40 U. S. C. Sec. 1291; and does not preclude *pro hac vici* ownership as between private owners and operators. The agent had only the duties of a husband to take care of shoreside business of the ship, but with no duties of a berthing agent which Garcia in this case had or as to actual management of the vessel. *Fink* distinguishes for seamen a "party to such a relation with them that it could be held vicariously liable for their torts." The *Weade* case, which also involved a judgment after trial for injuries on a War Shipping Administration vessel, held that it was erroneous to direct judgment notwithstanding the verdict, saying:

"As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's *own negligence* while acting as general agent, this direction should not have been given" (337 U. S. 809).

The decision below conflicts in principle, in this respect and as respects the *pro hac vici* principle, also with *The Standard Oil Co. v. Anderson*, 1909, 212 U. S. 215; *Linstead v. Chesapeake & Ohio Ry. Co.*, 1928, 276 U. S. 28 and

Denton v. Yazoo & Mississippi Valley RR. Co., 1932 284 U. S. 305. Petitioner submits that if the injured employee is a seaman it is not necessary under the Jones Act that a negligent employee be himself a seaman or member of the crew. Cf. *Pederson v. Delaware L. & W. R. Co.*, 1913, 229 U. S. 146, 150-151.

VI

Pendent jurisdiction; wage claim jurisdiction; diversity jurisdiction.

Liability herein is asserted against both *Compania* and *Garcia*, moreover, on the basis of the general maritime law of the United States as well as under the Jones Act, and presents for determination the question and conflicts noted under "II" *supra*, pages 12-19.

As respects both *Compania* and *Garcia*, the dismissal further conflicts in principle with *Hurn v. Oursler*, 1933, 229 U. S. 238; *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d, 834, 840; *Nolan v. General Seafoods Corp.*, 1 Cir., 1940, 112 F. 2d 515, 517, and *Lindquist v. Dilkes*, 3 Cir., 1942, 127 F. 2d 21. For, with jurisdiction existing of the Jones Act claim, there would be *pendent* jurisdiction also of the claims against them under the general maritime law, even if such jurisdiction would otherwise not exist under 28 U. S. C. Sec. 1331, and even if the claims under the Jones Act were determined against petitioner on the merits.

The dismissal of the second cause of action which claims wages to the end of the voyage conflicts also with this Court's decision in *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 348, showing that the courts of the United States are open to foreign seamen for enforcement of such claims.

Even the holding that there was no diversity jurisdiction presents an important question and, petitioner submits,

conflicts in principle with 26 U. S. C. A. Sec. 1332, and this court's decisions in *Strawbridge v. Curtiss*, 3 Cranch (7 U. S.) 267, and *Indianapolis v. Chase Nat. Bank*, 1941, 314 U. S. 63. This is because the "matter in controversy" between petitioner and Compania (the only defendant as to whom diversity is lacking) involves the injury of an employee and claims therefor under the Jones Act and general maritime law of the United States and for maintenance and cure and unpaid wages under the maritime law of the United States, and is distinct from the "matter in controversy" against the third-party defendants for their own negligence.

VII

The unfair requirement that petitioner waive in advance any claim to law jurisdiction, as a condition to allowing admiralty jurisdiction.

If this Court should hold, as respects any of defendants, that only jurisdiction in admiralty or only diversity jurisdiction is available to petitioner, this Court should then determine whether the District Court, as guardian of its seaman ward, erred in requiring petitioner, at pre-trial hearing and in advance of the Court's determination of the great questions of jurisdiction herein, to elect whether to amend his complaint and proceed upon diversity or in admiralty, and in holding that petitioner "elected at the pre-trial hearing not to amend his complaint and proceed" upon diversity or in admiralty.

VIII

The case is one of "special and important reasons for the grant of certiorari."

In a recent Federal Employers' Liability Act case, *Rogers v. Missouri P. R. Co.*, 1957, 352 U. S. 500, this Court said:

“Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination”

and that “this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination”.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

SILAS B. AXTELL,
Counsel for Petitioner,
15 Moore Street,
New York 4, N. Y.

Of Counsel:

NARCISO PUENTE, JR.,
60 Wall Street,
New York 5, N. Y.

CHARLES A. ELLIS,
37 Wall Street,
New York 5, N. Y.

APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. III Sec. 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under this Authority; . . . —to all Cases of admiralty and maritime Jurisdiction; . . . —to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . . In all the . . . Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

The Judicial Code, 28 U. S. C. A. Secs. 1331-1335 and 1652 provide:

"1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and cost, and arises under the Constitution, laws or treaties of the United States.

"1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in contro-

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versy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties . . .

"1333. ADMIRALTY, MARITIME AND PRIZE CASES.

The District courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

"1652. STATE LAWS AS RULES OF DECISION.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

46 U. S. C. A. Sec. 688; Act of June 5, 1920, ch. 250 Sec. 33, 41 Stat. 1007:

"RECOVERY FOR INJURY TO OR DEATH OF SEAMAN.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;"

45 U. S. C. Secs. 51, 55; Federal Employers' Liability Act of April 22, 1908, ch. 149, Secs. 1, 5, 35 Stat. 65, 66; August 11, 1939, ch. 685, Sec. 1, 53 Stat. 1404:

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"SEC. 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce . . . between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

"SEC. 55. CONTRACT, RULE, REGULATION, OR DEVICE EXEMPTING FROM LIABILITY; SET-OFF.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Opinion of District Court, Southern District of New York.

SUGARMAN, D. J.:

On May 12, 1954 the S. S. Guadalupe was berthed at Pier 2, Hoboken, New Jersey. During preparation for the receipt of cargo, Francisco Romero, a member of the crew was severely injured. Twelve days later he commenced suit in this court.

By amended complaint his action ultimately proceeded against four defendants, *i.e.*, International Terminal Operating Co. (International) Compania Trasatlantica, also known as Spanish Line (Compania), Garcia & Diaz, Inc. (Garcia) and Quin Lumber Co., Inc. (Quin). In due course, the case was sent to a jury part for trial. Prior to the commencement of the trial proper, the defendants orally moved for dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter. Inasmuch as determination of these motions necessitated the resolution of facts, the court ordered a pretrial hearing on the motions.¹

The objection by the plaintiff to the course pursued, upon the ground that the defendants waived the defense by interposing general appearances is overruled.² The objection by the plaintiff to the course pursued upon the ground that he was entitled to a jury trial on the controverted facts is likewise overruled.³

The plaintiff's motion to strike all testimony and exhibits is denied.

At a hearing it was stipulated by all parties that (1) plaintiff is a subject of Spain; (2) defendant International is a Delaware corporation; (3) defendant Com-

¹ F. R. Civ. P. 12 (d).

² F. R. Civ. P. 12 (h).

³ Moore's Fed. Prac. (2d Ed.) 294, para. 38, 36.

Moore's Fed. Prac. (2d Ed.) 2274, para. 12, 16.

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pania is a Spanish corporation; (4) defendant Garcia is a New York corporation; (5) defendant Quin is a New York corporation; (6) on May 12, 1954 plaintiff was employed as a member of the crew of and on board the S. S. Guadalupe; (7) The S. S. Guadalupe on May 12, 1954 was owned by the defendant Compania; (8) defendant Quin was an independent contractor under an oral contract with defendant Garcia for certain carpentry work necessary on the S. S. Guadalupe in preparation for the receipt of a cargo of grain; (9) defendant International was employed as Stevedore to load the cargo pursuant to an oral contract with defendant Garcia; (10) the S. S. Guadalupe was registered under the Spanish flag; (11) the voyage, during which plaintiff was injured, commenced at Bilbao, Spain, after which the vessel touched at other Spanish ports, came to the port of New York (Hoboken) went to Havana, Vera Cruz, back to Havana and returned to Hoboken, where it was then the accident happened.

The parties refused to stipulate as to the management, operation and control of the S. S. Guadalupe on May 12, 1954 and as to the contract of employment under which plaintiff was aboard the vessel on that day. Proof was taken on the two disputed issues.

**AS TO MANAGEMENT, OPERATION AND CONTROL OF THE
S. S. GUADALUPE ON MAY 12, 1954.**

The plaintiff's amended complaint alleges in Paragraph Fifth that defendant Compania operated, managed and controlled the vessel and in Paragraph Sixth that defendant Garcia operated, controlled and managed the vessel. On the basis of the deposition of defendant Garcia, through its treasurer, William Martinez, taken by plaintiff on June 10, 1954, and the contract between defendants Garcia and Compania, it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every

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respect for its principal, defendant Compania. It appears without contradiction that neither Garcia nor any stockholder thereof owns any stock in Compania, nor is any director of Garcia a director of Compania, nor does Garcia exercise any control over Compania. It further appears that the relationship between Garcia and Compania originated in 1935 when a partnership, the predecessor of Garcia, commenced representing Compania in this port. That partnership was succeeded by the present corporate defendant, Garcia, and pursuant to a contract made in 1948 between Garcia and Compania, the former has since that time husbanded the latter's vessels in this port. It further appears that defendant Garcia represents as many as ten other Spanish and Cuban ship owners in this port, none of whom is a subsidiary of defendant Compania. It further appears that defendant Garcia did not contribute financially to the purchase or construction of the S. S. Guadalupe. As such agent, defendant Garcia pays the pilot and docking charges and the charges for water and supplies for the vessels of defendant Compania, but all for the account of the defendant Compania. For this service defendant Garcia receives from the defendant Compania commissions, based upon the incoming and outgoing freight and passenger traffic. There was no proof adduced at the pre-trial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to his injury.

AS TO THE CONTRACT UNDER WHICH THE PLAINTIFF WAS A CREW MEMBER OF THE S. S. GUADALUPE ON MAY 12, 1954.

There was received in evidence an agreement executed on October 9, 1953 between plaintiff and defendant Compania. Within its four corners, that document clearly con-

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templates the plaintiff's employment by the said defendant for one round trip on the vessel to commence about October 10, 1953. It is agreed by all parties that no subsequent written contract was entered into between plaintiff and defendant ship owner. Nevertheless, at the completion of the round trip specifically identified in the written contract, plaintiff remained on board the vessel performing the same functions as deck hand for subsequent voyages, during one of which he met with his injury on May 12, 1954 at Hoboken, New Jersey, as aforesaid.

Testimony was taken from experts in Spanish law upon which the court finds that under the codes, laws and regulations of Spain, where a seaman sails on a given voyage pursuant to a written contract and subsequently thereafter uninterruptedly, as in this case, remains in the employ of the ship during subsequent voyages, the subsequent service is under all the terms and conditions set forth in the original written contract.

The written contract provided, among other things, that the parties thereto submitted themselves "to the provisions established by the Codes of Laws regulating Commerce and Labor as also all other regulations in force." It also provided "22. In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurance as determined by the Laws".

The court also finds, on the basis of the testimony of the experts in Spanish Law, that plaintiff has a right, by virtue of his injury, to a pension for life of somewhere between 35% and 55% of his seaman's wages which, if the negligence of the ship owner is established, may be increased by one half. It is also found that under the pertinent Spanish law, provisions is made for plaintiff for the counterpart of maintenance and dure. It is also found

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that plaintiff's said rights may be asserted by demand upon the Spanish Consul in this city.

On the basis of the foregoing stipulated and found facts we turn now to the question of jurisdiction in this Court to entertain the action.

The amended complaint in four causes of action seeks (a) damages against the defendant Compania and Garcia under the Jones Act for negligence and under the general maritime law for unseaworthiness of the vessel; (b) damages against the defendant Compania for maintenance and cure; (c) damages against all four defendants under the general admiralty law for a maritime tort. A jury trial is demanded. The possible bases of jurisdiction are four: (1) The Jones Act; (2) a federal question; (3) diversity; (4) discretionary, under the general maritime laws; the first three on the law side with a trial by jury; the fourth in admiralty with a trial to the court.

(1) Jurisdiction under the Jones Act.

It is settled in this circuit since *the Paula*⁴ and as recently as *Paduano v. Yamashita*, etc.⁵ that

"Alien seamen serving upon foreign ships owned by aliens, and bound upon a voyage which begins and ends outside of the United States cannot sue under the Jones Act for injuries suffered while the ship happens to be stopping at a port of call within our territorial waters."⁶

Accordingly, the plaintiff's action against the defendant Compania under the Jones Act must be dismissed.

⁴ 91 F. 2d 1001.

⁵ 221 F. 2d 615.

⁶ *Gambera v. Bergoty*, 2 Cir. 132 F. 2d 414, cert. den. 319 U. S. 742.

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In the light of the finding above that the defendant Garcia was solely an agent for the husbanding of the S. S. Guadalupe, plaintiff's Jones Act claim against this defendant must also be dismissed'

(2) Jurisdiction because of a federal question.

It is similarly established in this circuit⁷ that the facts herein present no federal question.

(3) Jurisdiction because of diversity.

Inasmuch as plaintiff and defendant Compania are both subjects of Spain, necessary diversity is lacking.⁸

(4) Discretionary jurisdiction in admiralty under the general maritime law.

In the light of the finding hereinabove that under Spanish law the plaintiff may have compensation for his injury with an additional amount if the defendant Compania is found to have been negligent and that plaintiff is also accorded under Spanish law the counterpart of maintenance and cure and that he may assert his claims to a Spanish Consul here, this court should and does decline jurisdiction even in admiralty as a matter of discretion.¹⁰

For the foregoing reasons, and plaintiff having elected at the pre-trial hearing not to amend his complaint and proceed upon diversity jurisdiction at law against defendants Garcia, International and Quin and having elected

⁷ *Cosmopolitan Shipping Co. v. McAllister*, 337 U. S. 783 at 790.

⁸ *Paduano v. Yamashita, etc., supra*. See also *Troupe v. Chicago Duluth & Georgian Bay Transport Company*, F. 2d.

⁹ *Tsitsinakis v. Simpson, Spence & Young* (S. D. N. Y.), 90 F. Supp. 578.

¹⁰ *Nakken v. Fearnley & Egger* (S. D. N. Y.), 137 F. Supp. 288.

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not to amend his complaint and proceed by libel in admiralty without a jury on general maritime jurisdiction against (a) all defendants if discretionary jurisdiction against defendant Compania is retained, or (b) if not, against defendants Garcia, International and Quin, the defendants' motions are granted and the complaint herein is dismissed.

It is so ordered.

Dated: June 15, 1956, New York, New York.

SIDNEY SUGARMAN,
United States District Judge.

Judgment entered
William V. Connell
6-15-56 Clerk

7/13/56 Costs taxed in favor of
Quin Lumber Co., Inc., in
sum of \$20.00

HERBERT A. CHARLSON,
Clerk

Costs taxed in favor of International Term. Operating Co.
in sum of \$20.00

Costs taxed in favor of Compania Trasatlantica & Garcia
& Diaz in sum of \$363.89. Herbert A. Charlson, Clerk
7/6/56 at 11:45 a. m.

Opinion of Court of Appeals, Second Circuit.

PER CURIAM:

We affirm on Judge Sugarman's workmanlike opinion below which contains a full statement of the facts.

We do not, however, overlook the appellant's invocation of Article VI* of the treaty of 1902 between the United States and Spain, in support of his contention, made apparently for the first time on the appeal, that the court below had jurisdiction under the Jones Act. 46 U. S. C. A. 688. We find nothing in the text of that Article which confers upon the appellant, a Spanish subject, the substantive rights created by the Jones Act. The appellant also argues that the abrogation of Article XXIII** of that treaty somehow demonstrates the presence of jurisdiction below. But as to this, appellant's counsel, with commendable candor, subsequent to argument provided us with a letter from a legal adviser in the State Department which states that Article XXIII of the 1902 treaty has been abrogated only in so far as its provisions are in conflict with the Seaman's

* "Article VI.

"The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of their rights, in all the degrees of jurisdiction established by law. They can be represented by lawyers, and they shall enjoy, in this respect and in what concerns arrest of persons, seizure of property and domiciliary visits to their houses, manufactories, stores, warehouses, etc., the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored Nation."

** "Article XXIII.

"Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have exclusive charge of the internal order of the merchant

(Footnote continued on following page)

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Act of March 4, 1915, 38 Stat. 1164.* Neither in Article XXIII nor in its abrogation do we find support for the appellant's position on the jurisdictional questions involved.

Affirmed.

(Footnote continued from preceding page)

vessels of their Nation and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consul addressed in writing to either the Federal, State or Municipal Authorities in the United States, or the Authorities or Courts in Spain, and supported by an official extract from the register of the ship or the list of the crew, and the prisoners shall be held during the whole time of their stay in the port at the disposal of the consular officers. Their release shall be granted at the mere request of such officers made in writing. The expenses of the arrest and detention of those persons shall be paid by the consular officers."

* The extent of the abrogation is stated to appear in correspondence and notification of abrogation printed in "Foreign Relations of the United States," 1915, page 3 *et seq.*; 1918, page 10; 1919, vol. 1, pages 54-67.

DEC 3 1957

JOHN T. PEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. ~~200~~ 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA, also known as SPANISH
LINE and GARCIA & DIAZ, INC. and QUIN LUMBER
CO., INC.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

NARCISO PUENTE, JR.,
60 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.

Of Counsel:

SILAS B. AXTELL,
15 Moore Street,
New York 4, N. Y.

CHARLES A. ELLIS,
37 Wall Street,
New York 5, N. Y.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

against

Petitioner,

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRAS-
ATLANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, INC. and QUIN LUMBER CO., INC.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

The Opinions of the Courts Below

The opinion of the United States District Court, Southern District of New York (R. 247-253a; Sugarman, D. J.) printed in the Appendix to the Petition, page 40 is reported in 142 F. Supp. 570 and 1956 A. M. C. 1579.

The per curiam opinion of the Court of Appeals for the Second Circuit (Hincks, Lumbard and Waterman, JJ.), printed in the Appendix to the Petition, page 47 is reported in 244 F. 2d 409 and 1957 A. M. C. 1230.

Jurisdiction

The decision and judgment of the United States Court of Appeals being reviewed was entered April 30, 1957. The petition for certiorari was docketed July 29, 1957.

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and was granted on October 14, 1957. The jurisdiction of this Court is under 28 U. S. C. Secs. 1254(1) and 2101(c).

Jurisdiction of this court was invoked to review important questions arising under the jurisdictional provisions of the Judicial Code, 28 U. S. C. A. Sec. 1331-1333, the general maritime law of the United States, the provisions of Section 33 of the Jones Act (46 U. S. C. 688) and of the Federal Employers Liability Act (45 U. S. C. Sec. 51-55) incorporated thereby, Article III, Sec. 2, Article VI, cl. 2 of the United States Constitution, and the treaty between the United States and Spain, and to review and settle conflicts in decisions.

This Court has not yet decided petitioner's application for an order dispensing with the printing of the record.

Constitutional and Statutory Provisions Involved

The provisions involved of the United States Constitution (Art. III, Sec. 2, and Art. VI, cl. 2) and statutes (Judicial Code 28 U. S. C. Secs. 1331, 1332, 1333, 1652; Jones Act of June 5, 1920, ch. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. Sec. 688; Federal Employers Liability Act of April 22, 1908, ch. 149, Secs. 1, 5, 35 Stat. 66, 45 U. S. C. Secs. 51, 55, and Art. VI and abrogated Art. XXIII of the treaty of 1902 between the United States and Spain (Treaty Series No. 422 re-printed by the Government Printing Office in February, 1954) are printed in the appendix hereto, pages 62-63.

Questions Presented

1. Whether under 28 U. S. C. Sec. 1331 the district court has and should exercise jurisdiction (a) of plaintiff's claims under the general maritime law of the United

States and (b) of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688).

2. Whether (a) the general maritime law of the United States and (b) the provisions of Section 33 of the Jones Act (46 U. S. C. Sec. 688) apply to the tort where a foreign seaman employed on a foreign ship suffers injuries, due to unseaworthiness of the vessel and negligence of its owner, its American agent and American stevedores and carpenters, while the ship is tied up at a pier in the port of Hoboken, New Jersey, for unloading and reloading, and the plaintiff is treated for his injuries for eight months in St. Mary's Hospital, Hoboken, New Jersey.

3. Whether such questions are questions of merits, to be tried and determined only in *exercise* of a fastened jurisdiction, and cannot, on motion to dismiss for "lack of jurisdiction of the subject matter", be changed from questions of merits into a question of jurisdiction and be tried and determined on such motion as a question of jurisdiction; and

Whether on such motion the District Court lacked authority to hear and determine the merits of a defense based on an alleged prior Spanish contract and the laws of Spain as allegedly affording plaintiff a sole remedy against his employer.

4. Whether the treaty with Spain and its partial abrogation pursuant to the mandate of the Seaman's Act of 1915, prior to enactment of Section 33 of the Jones Act as an amendment of said Seaman's Act, prevents or permits the Court to exercise jurisdiction in a case such as this.

5. Whether the election given by Section 33 of the Jones Act (46 U. S. C. Sec. 688) to "Any seaman" to maintain an action for damages at law with a right of trial by jury, and its incorporating the provisions of Sec-

tion 5 of the Federal Employers Liability Act (45 U. S. C. Sec. 55) that "Any contract, rule, regulation or device whatsoever" to exempt a carrier from liability under the statute shall to that extent be void, preclude holding that the jurisdiction of the district court can be defeated by a prior contract to have claims for injuries sustained by the seaman controlled by the law of Spain.

6. Whether evidence offered by defendants, on their motions to dismiss for "lack of jurisdiction of the subject matter," either to refute allegations of the complaint as to ownership, management, operation or control of the vessel, or to establish alleged defenses of foreign law and prior agreement between plaintiff and the foreign shipowner to have claims for injuries sustained while in the employ of such defendant controlled by the law of Spain, should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motion to strike the same; and whether the Court's findings based thereon should be reversed and stricken out.

7. Whether the district court, having jurisdiction of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688) and for unpaid wages, has and should exercise pendent jurisdiction of plaintiff's claims under the general maritime law of the United States against the same defendant, even if jurisdiction of such maritime law claims were otherwise lacking under 28 U. S. C. Sec. 1331.

8. Whether the district court has and should exercise jurisdiction under 28 U. S. C. Sec. 1332 of plaintiff's claims against the three American defendants by reason of diversity.

9. Whether the district court, if it lacked jurisdiction at law, has and should exercise jurisdiction in admiralty.

10. Whether it was error to dismiss for lack of jurisdiction of the subject matter the action of this disabled foreign seaman plaintiff (a) against the owner and operators of the foreign vessel for damages, maintenance and cure and unpaid wages, under the general maritime law of the United States and all statutes amendatory thereof, including specifically Sec. 33 of the Jones Act, and (b) against American third-party defendants for damages under the general maritime law of the United States.

Statement of the Case

Petitioner, a Spanish seaman and member of the crew of the Spanish S. S. Guadalupe was tragically injured on board the vessel while it was tied up at Pier No. 2, Hoboken, New Jersey on May 12, 1954 (R. 198a, par. Eighth; R. 202a par. Twenty-first), to unload passengers's baggage and take on cargo, and lumber for erecting shifting boards for grain cargo.

Petitioner's left leg was severed and his right leg broken with multiple fractures, in addition to other bodily injuries (R. 199a; R. 245a, par. 89). At point of death he was placed in St. Mary's Hospital, Hoboken, New Jersey, where he underwent treatment from May 12, 1954 until January 11, 1955 (R. 107a), a period of eight months.

No compensatory damages, compensation, maintenance and cure nor wages have been paid to petitioner or the hospital since the injury. The hospital bill of St. Mary's Hospital for \$3,750.60 (alleged as about \$4,000, R. 249a, par. 93) remains unpaid, and a lien therefor was filed by the hospital against any recovery petitioner may secure in this action (R. 109a-110a). Other bills of Americans including one for \$195 for an artificial limb for petitioner and one for \$25 for burial of the amputated part of his leg also remain unpaid (R. 245a, par. 94; R. 116a-117a).

Petitioner as plaintiff instituted an action at law against the Spanish corporate owner, Compania Trasatlantica, also known as Spanish Line (Compania) and three American corporations, Garcia & Diaz, Inc. (Garcia), International Terminal Operating Co. (International), and Quin Lumber Co., Inc. (Quin). A jury trial was demanded.

The amended complaint alleged that Compania and Garcia each owned, operated, controlled and managed the vessel, and that plaintiff was employed by each of said defendants (R. 198a, pars. Fifth-Seventh). International had with Garcia a stevedoring contract to unload (R. 201a, par. Eighteenth; R. 204a, par. Twenty-ninth) and Quin a carpentering contract to make shifting boards for a grain cargo (R. 203a, par. Twenty-sixth).

The amended complaint in four causes of action sought damages against the defendants Compania and Garcia under Section 33 of the Jones Act for negligence and under the general maritime law of the United States for unseaworthiness of the vessel (first cause, R. 197a-200a), for maintenance and cure and unpaid wages (second cause R. 200a-201a), and against all four defendants for damages under the general maritime law of the United States (first, third and fourth causes, R. 197a-200a; 201a-206a).

The allegations showing unseaworthiness and negligence include the following:

(a) The wire cable on the boom winch was unseaworthy in that it was twisted and old, and unsuitable for the task assigned (R. 199a, R. 238a, pars. 10, 12, 14; R. 240a, pars. 20, 21, 23; R. 241a, par. 30; R. 242a, par. 54; R. 244a, pars. 73, 83).

(b) The bosun of the S.S. Guadalupe negligently rushed Romero, and other members of the crew in the operation of lowering a boom prior to taking on the lumber (R. 202a, par. Twenty-first).

(c) The said bosun negligently ordered an insufficient number of crew members to perform the operation in which Romero was hurt; and negligently ordered Romero's assistants away and permitted the winch to be started while he was shorthanded and there was nobody to supervise the work (R. 204a, par. Twenty-ninth; R. 238a-239a, pars. 10, 12, 15, 19).

(d) The bosun was negligently called away from and negligently left the place where Romero was working, without providing proper supervision of the man operating the winch and a man to help Romero handle the metal lines (R. 205a, R. 239a, par. 18a).

(e) Garcia, International and Quin Lumber Co. were negligent in causing the bosun to leave his post of supervising the topping of the boom (R. 205a, R. 243a, par. 68, R. 244a, par. 78).

(f) The stevedore and land carpenter employees of Garcia, International and Quin rushed the bosun and the crew members to have the boom lowered even with insufficient crew members on the operation (R. 202a, par. Twenty-first).

(g) The land carpenters and stevedores, employees of Quin and International, twisted the boom winch wire by negligently throwing or kicking aside on the deck the wire previously laid out orderly by Romero (R. 204a-205a, R. 240a, par. 21).

(h) A carpenter or stevedore, in his attempt to aid Romero, tried to straighten out the twisted wire which Romero was feeding to the winch, but negligently failed to straighten or warn of a dangerous snarl in the wire which caused it to lose contact with the niggerhead (R. 239a, par. 18a).

(i) The menacing atmosphere created by the stevedores and carpenters toward the foreign crew members, including Romero, because they were doing an

operation usually done by said stevedores and carpenters for additional pay, made the whole operation additionally dangerous (R. 204a-205a, par. Twenty-ninth; R. 239a, par. 19; R. 204a, par. 22(a), 23(c), pars. 55, 56).

Jurisdiction was alleged of the claims against Compania and Garcia as an action brought under the general maritime law of the United States and all statutes amendatory thereof including Section 33 of the Jones Act (R. 200a).

Jurisdiction was alleged of the claims against International and Quin as an action cognizable under the Constitution of the United States and the general maritime law of the United States (R. 202a, 204a).

Jurisdiction as to these defendants was also predicated on diversity of citizenship (R. 202a), and diversity also exists as to Garcia.

The four answers of all defendants (R. 207a, 211a, 216a, 220a) put in issue substantially all of the allegations of each of the four causes of action; the answers of Compania and Garcia pleaded as a defense a lack of jurisdiction of the subject matter (R. 214a, 219a); and the answer of Compania also pleaded as a defense that plaintiff's sole rights were governed by an alleged Spanish contract and the laws of Spain and that plaintiff cannot maintain suit against it under the Jones Act or the general maritime law of the United States and that plaintiff's sole remedy must be asserted in Spain or before a representative of the Spanish government (R. 214a-215a).

Contested discovery proceedings were had preparatory for trial (*Romero v. International, etc.*, 1955 A. M. C. 1814).

Several months before plaintiff's recovery and discharge from the hospital, on a representation that a com-

pany doctor had examined plaintiff and said that he "could travel", counsel for Garcia & Diaz and Compania "sent a letter to Immigration" and told Garcia & Diaz "to tell Immigration immediately to send him back" (R. 90a-91a).

Motion, Pretrial and Decisions Below

When the action was called and assigned for trial a motion was made by defendants before the District Judge to whom the case had been assigned for trial to dismiss the complaint for "lack of jurisdiction of the subject matter."

The district judge to whom the case had been assigned for trial thereupon conducted instead a pre-trial hearing on this motion and repeatedly asserted that it was confined to such motion (R. 97a, 117a, 194a). In the conclusion of the hearing the court stated:

"The Court: * * * However, so there will be no misunderstanding, I am proceeding on the basis that each of the four defendants has moved orally, which brought on this pretrial hearing, for a dismissal of the complaint upon the ground of *lack of jurisdiction of the subject matter*.

Mr. Quinlan: *That is right.*

The Court: *And those are the motions I am going to decide*" (R. 194). (Italics ours.)

Over petitioner's objections (R. 8a, 19a-22a, 87a, 97a-103a, 176a) and subject to motion by petitioner to strike out the evidence (R. 104a-106a, 173a, 176a-177a), the Court, nevertheless, received evidence relating to the relationship between Compania and Garcia or its partnership predecessor all commencing in 1935 and with reference to the management, operation and control of the vessel, and evidence under the fourth defense of Compania based on allegations of Spanish contract and Spanish law.

Over objection and motion to strike the court received in evidence a contract signed by Romero for a previous round trip voyage notwithstanding that it was limited by its terms to that previous voyage, and that no contract was signed for the voyage on which the accident occurred (R. 15a).

Over objection and motion to strike the court heard the testimony of a foreign law expert for the defendant steamship company, and (without prejudice to petitioner's objections and motion to strike) a contrary opinion of a foreign law expert for the plaintiff, respecting the effect of the said contract and Spanish law, and made a finding that under the law of Spain, when the seaman remained in the employ of the ship during subsequent voyages the subsequent service was under the terms and conditions of the original written contract, a finding that an injured Spanish Seaman has an exclusive Workmen's Compensation remedy under Spanish law, and a finding that Garcia was solely an agent for husbanding the vessel.

It was "On the basis of the foregoing" facts first found in its opinion that the court did then "turn now to the question of jurisdiction in this court to entertain the action" (R. 251a, Appendix to Petition, p. 44). It held that "The possible bases of jurisdiction are four: (1) the Jones Act (2) a Federal question; (3) diversity; (4) discretionary, under the general maritime law; the first three on the law side with a trial by jury, the fourth in admiralty with a trial to the court" (R. 251a; Appendix to Petition, p. 44).

It ignored the question of (5) jurisdiction of the claim for unpaid wages, and (6) the question of pendent jurisdiction.

As to Jones Act jurisdiction, citing *The Paula*, 2d Cir. 1937, 91 F. 2d 1001; *Paduano v. Yamashita*, 2d Cir. 1955, 221 F. 2d 615 and *Gambera v. Bergoty*, 2d Cir. 1942, 132

F. 2d, 414, cert. den. 319 U. S. 742, and ignoring this Court's decision in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, the district court held that "It is settled in this circuit" than an alien seaman cannot sue under the Jones Act for injury suffered while the ship is in an American port and that "Accordingly, the plaintiff's action against the defendant Compania under the Jones Act must be dismissed." As respects Garcia, the Court, citing *Cosmopolitan Shipping Co. v. McAllister*, 1949, 337 U. S. 783, 790, held that "plaintiff's Jones Act claim against this defendant must also be dismissed" in light of the Court's finding that the defendant Garcia was solely an agent for husbanding the vessel. Notwithstanding that the pre-trial hearing was asserted to be on the question of jurisdiction only, the district court stated, in its opinion that:

"There was no proof adduced at the pretrial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to his injury." (Italics ours.)

It thus treated the jurisdiction motion and hearing as though it were a trial of the merits, but without affording plaintiff an opportunity to try the merits.

As respects "Jurisdiction because of a federal question" the district court, citing *Paduano v. Yamashita*, *supra*, and *Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir. 1956, 234 F. 2d, 253, held that "It is similarly established in this circuit that the facts herein present no federal question."

As respects jurisdiction because of diversity the district court, citing a Southern District court decision in *Tsitsinakis v. Simpson, Spence and Young*, S. D. N. Y., 90 F. Supp. 578, held that necessary diversity is lacking because plaintiff and defendant Compania are both subjects of Spain.

As respects discretionary jurisdiction in admiralty—which plaintiff did not plead—the court, citing a Southern District court decision, *Nakken v. Fernley and Egger*, S. D. N. Y., 137 F. Supp. 288, held that in light of its findings as to Spanish law the court would decline jurisdiction in admiralty even as a matter of discretion and that “the defendants’ motions are granted and the complaint herein is dismissed.”

On appeal by plaintiff, the Court of Appeals for the Second Circuit affirmed on the opinion of the District Court.

Notwithstanding that the amended complaint in the second cause of action pleaded a failure by defendants “to pay him wages to the end of the voyage” (R. 201a), and that this was argued in both courts, neither the District Court nor the Court of Appeals mentioned this in dismissing the complaint for lack of jurisdiction. Petitioner had cited in both courts this Court’s decision in *Strathern S. S. Co. v. Dillon*, 1920, 252 U. S. 348, holding that our wage statutes are specifically applicable to seamen on foreign vessels while in harbors of the United States, and that by statute the courts of the United States are open to such seamen for their enforcement.

Both the District Court and the Court of Appeals also failed to consider the question of pendent jurisdiction, fully argued by petitioner in both courts.

Confusion in the Second Circuit Between Points Decided and Undecided by This Court; Between Merits and Jurisdiction; Between Tort and Contract Law Locus; Between Grant by Congress of a Cause of Action and Grant of a Right to Sue; and Between Foreign and American Seamen as Respects Grant of the Right to Sue.

This Court has never decided but has noted and reserved for decision the two great questions:

(1) whether the District Court under 28 U. S. C. Section 1331 has jurisdiction of an action based on the general maritime law of the United States as one which "arises under the Constitution, laws, or treaties of the United States" (see *Pope & Talbot v. Hawn*, 1953, 346 U. S. 406, 410, footnote 4; and see "I", *infra*, pp. 20, 23); and

(2) whether Section 33 of the Jones Act is applicable when an alien seaman is injured on a foreign vessel in an American port (see *Plamals v. Pinar del Rio*, 1928, 277 U. S. 151, 155; *Urvic v. Jarka*, 1931, 282 U. S. 234; *Lauritzen v. Larsen*, 1953, 345 U. S. 571; and see "III", *infra*, pp. 40, 41).

During the pre-trial hearing herein the District Court stated, with reference to both these questions that "until the Supreme Court finally speaks we are never going to know . . . I only wish that the day would come. This may be the agency for getting the Supreme Court to speak once and for all" (R. 99a). See also: *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2d Cir. 1955, 221 F. 2d 615, 617.

In contrast with the two foregoing questions reserved and undecided by this Court,

(3) This Court consistently has sustained jurisdiction of actions at law under Section 33 of the Jones Act (*Panama R. R. Co. v. Johnson*, 1924, 264 U. S. 375, 383-384; *Lauritzen v. Larsen*, 1953, 345 U. S. 571, 574 and 575).

(4) This Court and the First and Third Circuits also have sustained and applied the principle of pendent jurisdiction (*Hurn v. Oursler*, 1933, 289 U. S. 238; *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d, 834, 840; *Nolan v. General Seafoods Corp.*, 1 Cir., 1940, 112 F. 2d 515, 517, and *Lindquist v. Dilkes*, 3 Cir., 1942, 127 F. 2d 21.

(5) This Court also throughout its history has repeatedly distinguished between jurisdiction and merits, holding that

merits, whether of plaintiff's claim or of defenses of defendant, may not be determined on motion to dismiss for lack of jurisdiction of the subject matter. (See cases cited in Point "II", *infra*, p. 33.)

(6) This Court in *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 354, 37 days before the Senate Report No. 573 proposing the amendment made in Section 33 of the Jones Act, emphasized the difference between grant of a cause of action and grant of a right to sue and that grant of a right to sue—unnecessary and wholly superfluous in the case of American seamen but necessary in the case of foreign seamen—manifests a purpose not to limit a statute to American seamen but to have it apply to seamen on foreign vessels in our ports.

But, for lack of a decision by this Court clarifying the applicability of Section 33 of the Jones Act to alien seamen injured on foreign vessels in American ports and treated at great expense to American hospitals, much confusion has been evinced in the lower courts, particularly in the Second Circuit, both (a) in failing to distinguish between the question of merits determinable by trial of the injured seaman's suit, and the question of jurisdiction of the subject matter determinable from reading plaintiff's complaint upon a motion to dismiss for lack of jurisdiction thereof; and (b) in failing to apply both in determining jurisdiction and in the trial and determination of such actions a proper and consistent *tort* theory and a proper construction of the first clause granting a right to sue, unnecessary and superfluous as to American seamen.

The confusion in the Second Circuit in these respects stems from its decision in *The Paula*, 2 Cir. 1937, 91 F. 2d 1001; and is manifest in its later decisions in *Gambetta v. Bergoty*, 2 Cir. 1942, 132 F. 2d, 414, *cert. den.* 319 U. S. 742; *Kyriakos v. Goulandris*, 2 Cir. 1945, 151 F. 2d 232; *Taylor v. Atlantic Maritime Co.*, 2 Cir. 1950, 179 F. 2d

597, cer. den. 341 U. S. 915; *Larsen v. Lauritzen*, 2 Cir. 1952, 196 F. 2d 220, reversed *Lauritzen v. Larsen*, 345 U. S. 571; *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2 Cir. 1955, 221 F. 2d 615; *Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir. 1956, 234 F. 2d 253; *McAfoos & Neff v. Canadian Pacific Steamship Ltd.*, 2 Cir. 1957, 243 F. 2d 270, and the case at bar. The *Paula*, *Gambera* and *Kyriakos* decisions were in admiralty and in *The Paula* the court erroneously undertook to decide the question of merits on a jurisdictional motion, upon which it declined to take jurisdiction and dismissed the libel on a holding that the Jones Act did not give right of recovery to a German who was a seaman on board a Danish vessel under articles signed in a Chilean port, and who was injured while the vessel was in the port of Jacksonville, Florida.

In *Gambera v. Bergoty* the court reversed a dismissal of a libel by an Italian subject who was a seaman on a Greek vessel and was injured in American coastal waters during a voyage from one United States port to another.

In *Kyriakos* the court sustained recovery by a Greek seaman who signed on a Greek vessel in an American port and injured in the American port of Fernaneina, holding the Jones Act applicable and distinguishing *The Paula* decision where the seaman had signed on abroad.

The *Taylor*, *Larsen*, *Paduano*, *Troupe* and *McAfoos* cases were actions at law.

In *Taylor* the court reversed the dismissal, but applied the place of contract theory. In *Taylor* the seaman, a citizen of Panama serving on a Panamanian ship, had signed on in an American port; in his suit for failure to treat after he contracted tuberculosis the court followed *The Paula* and *Gambera* decisions, holding respecting *The Paula* that "The varient at bar is that the seaman signed articles in the United States."

In *Larsen v. Lauritzen* the same court affirmed a recovery by a Danish seaman on a Danish ship for injury sustained in Cuban waters, citing the *Kyriakos* and *Taylor* decisions to support the recovery because the man signed on in an American port.

This Court in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, completely rejected "the place of contract" factor adopted by the Second Circuit, saying:

"But a Jones Act suit is for *tort*" (345 U. S. 588).

This Court also similarly rejected the Second Circuit's theory that *jurisdiction* depends on whether the injured seaman has an enforceable right under the Jones Act. It sustained jurisdiction notwithstanding that it reversed recovery after trial and dismissed the complaint on the merits.

The *McAfoos* case shows continued confusion as to the "election" and "may maintain" clause (243 F. 2d 272-274). Cf. Point III, *infra*, pages 40 *et seq.*

Summary of Argument

Until the Act of March 3, 1875, 18 Stat. c. 137, page 470, was enacted, the lower Federal courts had no original jurisdiction of any case arising under the Constitution, laws or treaties of the United States; and original jurisdiction in such cases was limited either to state courts or to diversity cases in Federal court.

That act, however, was intended to and did confer on the Circuit Court original jurisdiction in all cases of which the Supreme Court would have jurisdiction under the Constitution as cases arising under the Constitution, laws or treaties of the United States. Similarly, 28 U. S. C. A. Sec. 1331 now confers original jurisdiction on the United States District Court:

This includes not only actions based on Federal statutes, including the Jones Act (*Panama R. R. Co. v. Johnson*, 1924, 264 U. S. 375, 383-384; *Lauritzen v. Larsen*, 1953,

345 U. S. 571, 574-575), but actions based on the general maritime law of the United States (*Jansson v. Swedish American Line*, 1 Cir. 1950, 185 F. 2d 212; *Doucette v. Vincent*, 1 Cir. 1952, 194 F. 2d 834) of which the Supreme Court would have appellate jurisdiction whether from a state court (*Garrett v. Moore McCormack*, 1942, 317 U. S. 239) or from the law side of the United States District Court (*Pope & Talbot Inc. v. Hawk*, 1953, 346 U. S. 406; *Seas Shipping Co. v. Sieracki*, 1946, 328 U. S. 85, 88). See also for comparable interpretation of "laws" *Erie R. R. Co. v. Tompkins*, 1938, 304 U. S. 64, and *Warren v. U. S.*, 1951, 340 U. S. 523.

There was, therefore, jurisdiction of all claims pleaded by plaintiff, and the motion to dismiss for lack of jurisdiction of the subject matter should have been summarily denied.

There is a fundamental distinction between the question of jurisdiction and the question of merits; and the district court here erred in receiving evidence and in making findings and determinations of merits on the motion to dismiss for lack of jurisdiction of the subject matter. Such evidence should have been excluded on plaintiff's objections and should have been stricken out on plaintiff's motion to strike the same and the findings based thereon should be set aside.

Under Section 33 of the Jones Act moreover, a case such as this, where a foreign seaman was gravely injured on a foreign ship in an American port and treated at length in an American hospital, which remains unpaid, must be fully tried before a jury; and that statute precludes dismissal as for lack of jurisdiction of the subject matter without full trial of the case.

The provision of the Jones Act that any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages at law with the right of trial by jury was wholly unnecessary and superfluous in the case of American seamen,

but necessary and apt in the case of foreign seamen, and manifests that the statute was intended to apply to injuries such as this to a foreign seaman in an American port who undergoes treatment at great expense to an American hospital. Such provision clearly was inspired by similar reasoning in *Strathearn S. S. Co. v. Dillon*, 1920, 352 U. S. 354 with reference to comparable provisions of a wage statute opening the courts of the United States to foreign seamen for enforcement of the act—a provision wholly unnecessary and superfluous in the case of American seamen.

This intent moreover is further shown by other provisions of the Jones Act and by the debate in Congress concerning the same, evidencing that Congress intended the whole act to be for the promotion of the American merchant marine and the equalization to the extent possible of operating costs.

Section 5 of the Federal Employers' Liability Act (45 U. S. C. Sec. 55) makes void any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by such statute (*Phila. B. & Wash. R. Co. v. Schubert*, 1912, 225 U. S. 603, 613; *Duncan v. Thompson*, 1942, 315 U. S. 1-6); and this provision is incorporated by the Jones Act. It therefore, renders void, and makes inadmissible, any foreign contract attempting to preclude enforcement of the Jones Act by limiting the foreign seamen to some remedy abroad.

The contract admitted in evidence, moreover, was not for the voyage in question.

Our treaty with Spain not only fails to preclude assertion by such a Spanish seaman of rights here, but guarantees free access to the courts as well for the prosecution as for the defense of their rights.

As respects both Compania and Garcia, since jurisdiction existed of the action on the claims under the Jones

Act, there was also pendent jurisdiction against them of the claims under the General maritime law, even if such jurisdiction would not otherwise exist under 28 U. S. C. Sec. 1331 and even if the claims under the Jones Act were determined against petitioner on the merits.

The lower courts erred also in ignoring jurisdiction of the wage claim.

And even the holding that there was no diversity jurisdiction is erroneous because diversity existed as to the three American defendants, and the claims against them were not identical with the claims asserted against the Spanish defendant, Compania.

Even if this court should hold as respects any of the defendants that only jurisdiction in admiralty or only diversity jurisdiction is available to petitioner, it was unfair and unjust of the district court at pre-trial hearing, and in advance of the court's determination of the great questions of jurisdiction herein, to require petitioner to elect whether to amend his complaint and proceed upon diversity or in admiralty.

The judgment of the court of appeals and of the district court should be reversed; plaintiff's objections to the evidence offered by defense should be sustained and plaintiff's motion to strike out such evidence and to set aside the findings of the district court based thereon should be granted; and the motions of respondents to dismiss the complaint for lack of jurisdiction of the subject matter should be denied and the case remanded to the district court for trial.

POINT I

Under 28 U. S. C. A. Section 1331 the District Court clearly has jurisdiction (a) of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688) and (b) of plaintiff's claims under the general maritime law of the United States; and defendants' motions to dismiss for lack of jurisdiction of the subject matter should have been summarily denied.

A

1. It was by the Act of March 3, 1875, 18 Stat. ch. 137, page 470 that Congress first granted to the United States Circuit Court original jurisdiction of cases at law wherein the matter in controversy arises under the Constitution, laws or treaties of the United States, as follows:*

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

This jurisdictional concept has been retained in the present statute, 28 U. S. C. Sec. 1331, giving district courts original jurisdiction of

"all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

* The Sixth Congress in 1801, 2 Stat., c. 4, pages 89-100, in sec. 11, page 92, had granted such jurisdiction to the Circuit Court; but this had been repealed by the Seventh Congress in 1802, 2 Stat., c. 8, page 132, without application thereof in the Courts.

Consequently, *until enactment of the Act of March 3, 1875*, the lower federal courts could exercise jurisdiction in such cases at law only where there was diversity of citizenship; where there was no diversity, such cases at law could be prosecuted only in state courts; and this was true whether the case arose under the Constitution or statutes of the United States or under decisional substantive law of the United States (such as the substantive maritime law), or under treaties of the United States.

2. But under the Constitution the judicial power extended to and this Court had appellate jurisdiction in all such cases whether they arose in State courts or in Federal courts, and whether they involved Federal Statutes or Federal decisional substantive law such as the substantive maritime law.

The United States Constitution in Article III, Sec. 2 (Appendix, *infra*, p. 59) provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"; and that in all the Cases before mentioned, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Cases such as *Cohens v. Virginia*, 1821, 6 Wheat. (19 U. S.) 264, 378; *Osborne v. U. S. Bank*, 1824, 9 Wheat. (22 U. S.) 738, 821 and *Garrett v. Moore McCormack*, 1942, 317 U. S. 239, 245, 246, show that the Constitution thus extended the Federal judicial power, including this Court's power of review in Federal maritime law cases in State Courts (*Garrett v. Moore McCormack*, *supra*), to all cases involving substantive Federal law.

3. When the Act of 1875 was before Congress (Hart & Wechsler, *The Federal Courts and the Federal System*, p. 75), Senator Carpenter, sponsoring the act, said:

"The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do, it did not perform what the Supreme Court has declared to be the duty of Congress. *This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.*" (Italics ours.)

It is not, therefore, by chance that the language of the Act of March 3, 1875 and of present 28 U. S. C. Sec. 1331, literally covered every case that the Constitution provision covers.

It was *intended* to give, first the Circuit Court and later the District Court, original jurisdiction of every case of which this Court could have appellate jurisdiction as a case arising under the Constitution or laws of the United States, and to make no distinction in respect to jurisdiction of the one Court any more than the other between cases based on Federal Statutes and cases based on Federal Substantive Law such as the maritime law.

B

Since the Act of 1875 was enacted, it has never been doubted that a case arising under a statute of Congress and involving construction thereof is within the jurisdiction of the district court.

In *Panama R. R. Co. v. Johnson, supra*, 1924, 264 U. S. 375, 383-384, it was specifically held that an action under the Jones Act was within the jurisdictional provision of old Section 24 of the Judicial Code, now 28 U. S. C. 1331.

Moreover in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, this court held that the district court had *jurisdiction* of a Jones Act action by a Danish seaman for injury sustained on a Danish vessel while in Cuban waters,

although, the case having been tried, the court then held on the *merits* that he was not entitled under the Jones Act to recover damages. Respecting *jurisdiction* of the district court this Court said:

"The question of jurisdiction is shortly answered . . . A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact. Cf. Montana-Dakota Co. v. Public Service Co., 341 U. S. 246, 249" (345 U. S. 574-575).

The language quoted, and the Court's citation of the *Montana-Dakota Co.* case distinguishes the question of jurisdiction from the issue of *merits*, as more fully shown, *infra*, Point II. And jurisdiction was definitely sustained even in the *Lauritzen* decision.

C

5. The question of jurisdiction of cases at law, wherein the subject matter is that of the Federal maritime law, in recent years has occasioned conflict of decisions.

Jurisdiction has been sustained by the First Circuit Court of Appeals in *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d 834, and *Jansson v. Swedish American Line*, 1st Cir. 1950, 185 F. 2d 212.

Jurisdiction has been denied by the Third Circuit Court of Appeals in *Jordine v. Walling*, 3rd Cir. 1950, 185 F. 2d 662, and by the Second Circuit in *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2d Cir. 1955, 221 F. 2d 615, and in the case at bar. See also *Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir. 1956, 234 F. 2d 253; and *McAfoos v. Canadian Pacific Steamship Lines*, 2d Cir. 1957, 243 F. 2d 270.

The conflict between the First and Third Circuits was noted by this Court in *Pope & Talbot Inc. v. Hawn*, 1953,

346 U. S. 406, 410, footnote 4, where, because of diversity sufficient to support jurisdiction, this Court said:

"In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U. S. Code, sec. 1331 as arising 'under the Constitution, laws or treaties of the United States'. See *Doucette v. Vincent*, 194 F. 2d 834 and *Jansson v. Swedish American Line*, 185 F. 2d 212. Cf. *Jordine v. Walling*, 185 F. 2d 662."

In the *Paduano* case, the Second Circuit disagreed with the First Circuit, and disagreed with the reasoning while agreeing with the result in the Third Circuit case; and specifically stated that "the conflict must ultimately be resolved by the Supreme Court" (221 F. 2d 617).

Both the *Troupe* and *McAfoos* decisions indicate doubt respecting the *Paduano* decision, saying in *Troupe* "If that decision is to be adhered to" (234 F. 2d 257), and saying in *McAfoos* that "it is not clear whether or not these theories can be pursued in a Federal court. See *Troupe*" (243 F. 2d 271).

In the case at bar the lower courts, nevertheless, cited and relied on the *Paduano* case; and the conflict in the three circuits is now presented for determination by this Court.

6. In *Jansson v. Swedish American Line*, *supra*, 185 F. 2d 212, at 217-218, Chief Justice McGruder reasoned infallibly as follows; and quoting from *Knickerbocker Ice Co. v. Stewart*:

"If the 'Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law,' and if, when a cause of action cognizable in admiralty is sued on at common law, either in a state court or on the law side of a federal district court, the court must apply the general maritime law rather than the law of the state of the

forum, and if the judgment of a state court in such a case is reviewable by the United States Supreme Court because a federal question is necessarily involved, then it would plainly follow, we think, that a civil action for damages filed on the law side of a federal district court, to enforce a claim cognizable in admiralty, may be maintained in the district court pursuant to 28 U. S. Code, sec. 1331 as a case arising 'under the Constitution, laws or treaties of the United States'—assuming, of course, that the requisite jurisdictional amount is present, and that the venue requirements of 28 U. S. Code, sec. 1391 are met. This would be so whether or not diversity of citizenship also existed, for such diversity, if present, would only be a cumulative or additional basis of jurisdiction under 28 U. S. Code, sec. 1332." (Italics ours.)

This reasoning is in accord both with the comparable language of 28 U. S. C. Sec. 1331 and Article III, section 2 of the Constitution and with the statement, above quoted, made by Senator Carpenter when the Act of 1875 was before Congress (Hart & Wechsler, *The Federal Court and the Federal System*, p. 75).

By contrast the conclusion in *Jordine* that "a cause of action arising under the maritime law is to be regarded as non-federal in character" (185 F. 2d 671) and the confusion in *Paduano* between cases of "admiralty and maritime jurisdiction" and cases at law based on substantive maritime "law" are completely fallacious.

As said by Chief Justice McGruder in *Doucette v. Vincent*, *supra*, 1952, 1st Cir. 194 F. 2d 834, 843:

"But at the time of the adoption of the Constitution it was well known that many cases which, because of their subject matter, were cognizable in a court of admiralty, might also be prosecuted by a personal action for damages in a court of common law, for instance, actions ex contractu for seamen's wages or for

breach of a charter party, or actions ex delicto for personal injuries, or injuries to property by collision or otherwise. See 1 Benedict on Admiralty, sec. 20 et seq. (6th ed., 1940); *Schoonmaker v. Gilmore*, 102 U. S. 118 (1880); *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 388, 1924 A. M. C. 551 (1924). Such common law cases were not cases in admiralty, though the claims sued on were also cognizable in admiralty. They were 'Cases in Law.' " (Italics ours.)

This is the distinction between cases "in law" and cases "of admiralty and maritime jurisdiction" under Article III, sec. 2 of the Constitution.

It also is the distinction under the saving clause, 28 U. S. C. Sec. 1333, between a civil case "of admiralty or maritime jurisdiction", of which the district courts have exclusive admiralty jurisdiction, and the "all other remedies" saved to suitors "in all cases."

It is this distinction between cases arising under the Constitution and laws of the United States and cases involving exercise of admiralty and maritime "jurisdiction" which was recognized in *American Insurance Co. v. Canter*, 1828, 1 Peters (26 U. S.) 511 and in *The City of Panama*, 1879, 109 U. S. 453; and the *Paduano* decision misinterprets the *American Insurance Co.* decision in this respect.

The Federal District Courts on the law side, alike with the State courts, cannot exercise admiralty and maritime "jurisdiction", i.e., jurisdiction "in admiralty", as distinct from "all other remedies" saved by 28 U. S. C. Sec. 1333 to "suitors in all cases". But where "the matter in controversy" is one based on the substantive maritime law of the United States, which, if brought in a State Court would be reviewable by this Court as one arising under the Constitution, laws or treaties of the United States, the Federal District Courts now have original jurisdiction thereof under 28 U. S. C. Sec. 1331, if such matter in controversy also exceeds the sum or value of \$3,000.00.

7. As this Court has frequently held, the substantive general maritime law of the United States is a part of the laws of the United States.

The Lottawanna, 1874, 21 Wall. (88 U. S.) 558, 573, 576;

Knickerbocker Ice Co. v. Stewart, 1920, 253 U. S. 149, 160;

Carlisle Packing Co. v. Sandanger, 1922, 259 U. S. 255, 259;

Panama Railroad Co. v. Johnson, 1924, 264 U. S. 375, 385, 386;

Uravic v. Jarka Co., 1931, 282 U. S. 234, 240;

Garrett v. Moore McCormack Co., 1932, 317 U. S. 239, 245, 246;

O'Donnell v. Great Lakes Dredge & Dock Co., 1943, 318 U. S. 36, 40;

Swanson v. Mara Brothers, 1946, 328 U. S. 1;

Seas Shipping Co. v. Sieracki, 1946, 328 U. S. 85, 88;

Pope & Talbot Inc. v. Hawn, 1953, 346 U. S. 406, 409.

As said in *The Lottawanna*, *supra*:

"Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as *its own law*, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law . . .

"To ascertain, therefore, what the maritime law of this country is, . . . The decisions of this court . . . are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed" (21 Wall. 573, 576). (Italics ours.)

In *Knickerbocker Ice Co. v. Stewart*, *supra*, this Court said:

"The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction" (253 U. S. 160). (Italics ours.)

Again in *The Lottawanna* case at page 574:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesman of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'" (Italics ours.)

While, therefore, as distinct from *proceedings in admiralty*, "*Proceedings in a suit at common law . . . are precisely the same as in suits . . . not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty*" (*The Belfast*, 1868, 7 Wall. (74 U. S.) 624, 645); it is now well settled that in such a case the substantive general maritime law of the United States must be applied, for the simple reason that it is the substantive law of the United States, whether the civil action be in a State court (*Garrett v. Moore McCormack*, *supra*, 1942, 317 U. S. 239, 245, 246) or on the law side of the United States District Court (*Pope & Talbot, Inc. v. Hawn*, *supra*, 1953, 346 U. S. 406, 490; *Seas Shipping Co. v. Sieracki*, *supra*, 1946, 328 U. S. 85, 88).

The substantive general maritime law of the United States is, therefore, equally a part of the "Constitution, laws, or treaties of the United States" within the jurisdictional provisions of 28 U. S. C. Sec. 1331, as are any other provisions of substantive Federal law.

8. In the *Paduano* decision and this case the lower courts have failed to note the difference between the comprehensive and unqualified term "laws of the United States" in the jurisdiction provisions of Art. III, Sec. 2 of the Constitution, which 28 U. S. C. A. Sec. 1331 employs, and the qualified term "laws of the United States, which shall be made in pursuance thereof", in the supremacy provision of Art. 6 of the Constitution, which Sec. 1331 does not employ. It thus conflicts in principle with *Mayor v. Cooper*, 1867, 6 Wall. (73 U. S.) 247, 253, where this distinction is noted and where this Court said:

"The decisions of the courts of the United States within their sphere of action, are as conclusive as the laws of Congress made in pursuance of the Constitution."

9. The case also conflicts in principle with *Erie R. R. Co. v. Tompkins*, 1938, 304 U. S. 64, interpreting the term "laws of the several states" in 28 U. S. C. Sec. 1652,* and with *Warren v. United States*, 1951, 340 U. S. 523, interpreting the term "national laws" in Art. 2, par. 2 of the Shipowners Liability Convention (54 Stat. 1693).

* One commentator (*The Extension of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory* (1952), 66 Harvard L. Rev. 315, 324) has stated that:

"The authorities cited by the *Jordine* case to support its position simply do not establish or even imply that 'laws' in Section 1331 excludes decisional law, and there appear to be no holdings elsewhere to that effect. It may, however, be significant that *Erie R. R. v. Tompkins* interpreted the word 'laws' in another statute to include decisional law."

Another commentator five years earlier (*The Tangled Seine: A Survey of Maritime Personal Injury Remedies* (1947), 57 Yale L. J. 243, 245), had said of *Southern Pacific Co. v. Jensen*, 1917, 244 U. S. 205, that:

"The case represents the *Erie v. Tompkins* of the admiralty field except that the shoe is on the other foot, the state courts being obliged to follow 'substantive' law as declared by the Supreme Court, but left free to apply their own 'procedure'."

In those cases this Court held that such provisions include unwritten as well as written law, whether legislative or Court-made.

The recent six-year conflict of the Circuits, respecting the words "laws of the *United States*" in Section 1331, indeed, is remarkably comparable to the century of mistake in interpreting the opposite, complementary and comparable term "laws of the *several States*" in Section 1652; corrected when *Erie R. R. Co. v. Tompkins*, 1938, 304 U. S. 64, overruled *Swift v. Tyson*, 1842, 16 Pet. (41 U. S.) 1, 18.

Whereas *Swift v. Tyson* held that "laws" meant only statutes, the *Erie R. R. Co. v. Tompkins* decision overruled this and held that it included law "*unwritten as well as written*", "*unwritten 'general law'*", "*substantive rules*" of law "be they commercial law or a part of the law of torts" announced by the voice adopted by the State as its own "*whether it be of its Legislature or of its Supreme Court*" (304 U. S. 73, 74, 78, 79). It pointed out that the opposite doctrine "prevented uniformity" (304 U. S. 74) "prevented uniformity in the administration of the law" (304 U. S. 75), and occasioned "injustice and confusion" (304 U. S. 77).

In *Warren v. United States*, 1951, 340 U. S. 523, the Supreme Court applied the doctrine of *Erie R. R. Co. v. Tompkins* in interpreting the term "national laws" with reference to maritime law. The Shipowners Liability Convention (54 Stat. 1693) in Art. 2 provided liability for maintenance and cure in par. 1, subject to the proviso of par. 2 "that national *laws* or regulations may make exceptions in respect of" stated injuries or sickness. Congress had not enacted any statute to make any exception, although Secretary Hull and Chief Justice Stone thought this essential and legislation had at one time been introduced and passed in the House of Representatives. The Court held that the exceptions "are operative by virtue of the General Maritime Law and that no act of Congress is necessary to give them force" (340 U. S. 526), saying:

"The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts" (340 U. S. 526)

and that:

"Much of this body of maritime law had developed through the centuries in judicial decisions. To reject that body of law and start anew with a complete code would be a novel and drastic step" (340 U. S. 527).

We submit that the term "laws of the several states" in 28 U. S. C. Sec. 1652 and the opposite term "laws of the United States" in 28 U. S. C. Sec. 1331 are comparable and complementary terms in the Judicial Code, and that, equally as held of the Section 1652 term "laws of the several states" in *Erie R. R. Co. v. Tompkins*, the term "laws of the United States" in Section 1331 includes decisional law, whether originally antedating and incorporated by the Constitution, or subsequently established by controlling decisions of this Court.

10. It was solely because (excepting the short lived Act of 1801, 2 Stat. ch. 4, repealed in 1802, 2 Stat. ch. 8) original jurisdiction was not granted by Congress to the lower Federal Courts in cases arising under the Constitution or laws of the United States until the Act of March 3, 1875, 18 Stat. c. 137, page 470, that *prior thereto* this Court held that the only remedy at law in federal courts in actions involving the maritime law was in diversity cases. See *The Belfast*, 1869, 7 Wall. (74 U. S.) 624, 643, 644; *Leon v. Galceran*, 1870, 11 Wall. (78 U. S.) 185, 188; and *Steamboat Co. v. Chase*, 1872, 16 Wall. (83 U. S.) 522, 533, all decided before the Act of 1875.

But in *The Belfast*, *supra*, this Court said, respecting the saving clause, in what is now 28 U. S. C. Sec. 1333:

"Observe the language of the saving clause under consideration. It is to *suitors*, and *not* to the State Court nor to the Circuit Courts of the United States.

Examined carefully, it is evident that Congress intended by that provision *to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy*" (7 Wall. 74 U. S. 644). (Italics ours.)

Similarly both in *Leon v. Galceran, supra*, and *Steamboat Company v. Chase, supra*, this Court said:

"He may have an action at law in the case supposed *either in the Circuit Court or in a State Court*, because the common law, in such a case, is competent to give him a remedy, and *wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the Ninth Section of the Judiciary Act*" (11 Wall. (78 U. S.) 188, and 16 Wall. (83 U. S.) 533). (Italics ours.)

This language applies equally now to the remedy given by 28 U. S. C. Sec. 1331, as to the diversity remedy given by section 1332.*

For the *saving clause* even as originally worded *did not specify diversity* but specified rather "a common law remedy where the common law is competent to give it"; and the present *saving clause*, 28 U. S. C. Sec. 1333, does not specify diversity but specifies rather "all other remedies to which they are entitled".

The remedy by reason of the action being based on the substantive maritime law of the United States is equally as available under 28 U. S. C. Sec. 1331 as is the remedy based on diversity under Sec. 1332.

* The *Paduano* argument respecting removability is as uncontrolling respecting cases under Sec. 1331 as it was of cases under Sec. 1332.

POINT II

The Court's failure to distinguish between jurisdiction and merits, depriving petitioner of his right to a trial of the merits in the manner prescribed by law.

Evidence on the merits should not have been admitted, and should have been stricken out; and the findings based thereon should be set aside.

A

This Court has repeatedly held that a complaint which sets forth a substantial claim under the Constitution or laws of the United States presents a case within the jurisdiction of the District Court, as a federal court; that there is a fundamental distinction between the question of jurisdiction and the question of merits; that such jurisdiction cannot be made to stand or fall upon the way the court may decide the legal sufficiency of the facts alleged or the legal sufficiency of facts proven; and that its decision either way upon either question "is predicated upon the existence of jurisdiction, not upon the absence of it."

Binderup v. Pathe Exchange, 1923, 263 U. S. 291, 305, 306;

The Fair v. Kohler Die & Specialty Co., 1913, 228 U. S. 22, 25;

Bell v. Hood, 1946, 327 U. S. 678, 681, 682;

Alma Motor Co. v. Timpkin Detroit Axle Co., 1946, 329 U. S. 129, 130;

Swafford v. Templeton, 1902, 185 U. S. 487, 491, 493, 495;

Huntington v. Laidley, 1900, 176 U. S. 688;

Louisville Trust Co. v. Knott, 1903, 191 U. S. 225, 233;

Public Service Co. v. Corboy, 1919, 250 U. S. 153, 162-163;

Smithers v. Smith, 1907, 204 U. S. 632, 645;

Barry v. Edmunds, 1886, 116 U. S. 550, 565;

Wetmore v. Rymer, 1898, 169 U. S. 115, 122, 128;
Illinois Central Railroad v. Adams, 1901, 180 U. S.
 28, 34-35;

Venner v. Great Northern Railway, 1908, 209 U. S.
 24, 34-35.

In *Bell v. Hood*, *supra*, 1946, 327 U. S. 678, 681, 682, reversing both lower courts and sustaining jurisdiction on the plaintiff's complaint, this Court held that "the district court must look to *the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States.*" This Court further said that:

"Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact *it must be decided after and not before the court has assumed jurisdiction over the controversy.* If the Court does later *exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.*" (Italics ours.)

In *Smithers v. Smith*, *supra*, 1907, 204 U. S. 632, 645, this Court reversing a dismissal, disapproved of trying "part of the controversy" on jurisdictional hearing (204 U. S. 644), and said:

"For it must not be forgotten that where in good faith one has brought into court a cause of action, which, *as stated by him, is clearly within its jurisdiction, he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind.* This was clearly stated by Mr. Justice Matthews in *Barry v. Edmunds*, 116 U. S. at page 565 . . ." (Italics ours.)

In *Binderup v. Pathe Exchange, supra*, 1923, 263 U. S. 291, 306, this Court said:

“*Jurisdiction*, as distinguished from *merits*, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit.”

The question carefully reserved by this Court in *Plamals v. Pinar del Rio, supra*, 1928, 277 U. S. 151, 155, and undetermined in either *Uravic v. Jarka Co., supra*, or *Lauritzen v. Larsen, supra*, certainly is not frivolous.

In *Illinois Central Railroad Co. v. Adams, supra*, 180 U. S. 28, 34-35, by Mr. Justice Brown, and in *Venner v. Great Northern Railway, supra*, 209 U. S. 24, 34-35, by Mr. Justice Moody this Court said:

“Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. . . . It may undoubtedly be shown in *defense* that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, *but that is no defect of jurisdiction*, but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have *jurisdiction* to inquire whether such disability in fact existed, *nor that the case could be dismissed on motion for want of jurisdiction.*”
(Italics ours.)

It clearly was error in the case at bar to dismiss the action for “lack of jurisdiction of the subject matter”.

The Court has and must first exercise jurisdiction of the subject matter in order to determine the question of merits whether the plaintiff is entitled to a recovery under the law and facts pleaded in his complaint.

B

Petitioner submits further that for the foregoing reasons, the evidence offered by respondent, Compania respecting the alleged contract of the seaman and the law of Spain should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motions to strike the same, and that the findings based thereon should be set aside as clearly erroneous.

In *The Fair v. Kohler Die & Specialty Co.*, *supra*, 1913, 228 U. S. 22, 25, *this court specifically distinguished in this respect the jurisdictional question when jurisdiction is rested on the plea of a federal statutory cause of action, and the jurisdictional issue where jurisdiction is rested on diversity of citizenship.* In the latter case *diversity* jurisdiction depends on whether in fact plaintiff's citizenship is diverse from defendant's and *diversity* jurisdiction may be defeated by a plea of the citizenship of the parties; a pre-trial hearing thereon may be had and evidence taken and findings made *as to the jurisdictional issue of diversity.* This is because diversity has nothing to do with the merits. But this Court specifically held that, by contrast,

“when the plaintiff bases his cause of action upon an act of Congress, *jurisdiction cannot be defeated by a plea denying the merits of the claim*” (228 U. S. 25). (Italics ours.)

The decision herein overruling plaintiff's objection to the course pursued and the taking of evidence on the merits and denying plaintiff's motion to strike the testimony and exhibits (R. 247a; plaintiff's claim of surprise, R. 8a; objections, R. 19a-22a; exception, 176a; motion to

strike, R. 104a-106a, 173a, 176a-177a) thus conflicts either directly or in principle with this Court's decision in *The Fair v. Kohler Die & Specialty Co.*, and other decisions herein above cited, pages 33-34, *supra*.

The District Court referred to 5 Moore's Federal Practice, 2d Ed., pages 38, 36 (R. 41a-42a) which, however, relates to an issue of jurisdiction "*such as diversity*"; and this points up the error of the lower courts in failing to apply herein the distinction specifically made by this Court in *The Fair v. Kohler Die & Specialty Co.*, *supra*.

C

The evidence taken herein also was improper and the findings made thereon are clearly erroneous because the contract offered and admitted and on which the findings were based *covered only a prior voyage and not the voyage here involved*.

This is a question of contract—of agreement by the parties—rather than of conflict of laws; and plaintiff is entitled to a jury trial thereof (*South Chicago Coal & Dock Co. v. Bassett*, 1940, 309 U. S. 251; *Senko v. La Crosse Dredging Co.*, 1957, 352 U. S. 370). On the one hand respondent Compania and the lower court contend that Spanish law applies because Romero *agreed* that Spanish law apply; on the other hand they contend that this agreement is *imposed* by Spanish law—contrary to the text of the only agreement he made that it be limited to only a prior voyage.

D

Moreover, since the action is based on the Jones Act which is incompatible with any such agreement, the alleged agreement for this reason also is immaterial and inadmissible in such action.

The Jones Act incorporates the Federal Employers Liability Act; and the injured seaman accordingly has the

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benefit of Section 5 of the Federal Employers Liability Act (45 U. S. Sec. 55), which provides that:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Construing such Section 5, this Court has held in *Phila. B. & Wash. R. Co. v. Schubert*, 1912, 225 U. S. 603, 613, that "the purpose or intent" mentioned do not refer simply to an actual intent of the parties to circumvent the statute, but that the purpose and intent of the contract or regulations "is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce".

In *Duncan v. Thompson*, 1942, 315 U. S. 1, 6, this court held that "Congress wanted Section 5 to have the full effect that its phraseology implies."

Construing together the Jones Act election right (46 U. S. C. Sec. 688), and this incorporated provision of Sec. 5 of the Employers' Liability Act (45 U. S. C. Sec. 55), it is clear on the merits that "Any seamen" entitled to the benefits of the Jones Act and electing to sue thereon cannot be deprived of the benefits thereof by any advance contract, rule, regulation, or device to have the law of a foreign country apply instead, and that any such contract provision is invalid and inadmissible in a Jones Act action.

E

The issue whether defendant Garcia is liable under the Jones Act, or is a husband of the ship who could not be liable as employer under the Jones Act, petitioner submits, is also an issue of merits which cannot properly be heard, tried and determined on a motion to dismiss for "lack of jurisdiction of the subject matter"; and

the evidence and findings thereof should be stricken out. In view of the extraordinary circumstances alleged, moreover, this issue cannot be determined without the court exercising jurisdiction and trying the case on the merits before a jury.

The lower courts' decision herein as respects Garcia, is not in accord with but conflicts in principle with *Cosmopolitan Shipping Co. v. McAllister*, 1949, 337 U. S. 783, relied on by the Court (R. p. 252a; Appendix to Petition, p. 45), and with *Fink v. Shepard S. S. Co.*, 1949, 337 U. S. 810, and *Weade v. Dichmann, Wright & Pugh, Inc.*, 1949, 337 U. S. 801, simultaneously decided therewith.

Cosmopolitan Shipping Co. v. McAllister, was decided as a determination of the merits after full trial of the case and verdict by a jury.

It involved a general shipping agent of the United States Government under a war shipping contract subject to the War Shipping Administration (Clarification) Act, 57 Stat. 45, 40 U. S. C. Sec. 1291; and does not preclude *pro hac vici* ownership as between private owners and operators. The agent had only the duties of a husband to take care of shoreside business of the ship, but with no duties of a berthing agent which Garcia in this case had or as to actual management of the vessel.

The *Fink* case distinguishes for seamen a "party to such a relation with them that it could be held vicariously liable for their torts."

The *Weade* case, which also involved a judgment after trial for injuries on a War Shipping Administration vessel, held that it was erroneous to direct judgment notwithstanding the verdict, saying:

"As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's own negligence while acting

as general agent, this direction should not have been given" (337 U. S. 809).

The decision below conflicts in principle, in this respect and as respect the *pro hac vice* principle, also with *The Standard Oil Co. v. Anderson*, 1909, 212 U. S. 215; *Linstead v. Chesapeake & Ohio Ry. Co.*, 1928, 276 U. S. 28 and *Denton v. Yazoo & Mississippi Valley R. R. Co.*, 1932, 284 U. S. 305.

Petitioner submits that if an injured employee is a seaman it is not necessary under the Jones Act that a negligent employee be himself a seaman or member of the crew. Cf. *Pederson v. Delaware L. & W. R. Co.*, 1913, 229 U. S. 146, 150-151.

The motion herein was solely for a dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter (R. 194, See District Court opinion in Appendix to Petition, p. 40). The sole question on which any pre-trial hearing could be had or evidence taken therefore was the issue of diversity. All the other evidence should have been excluded on plaintiff's objections and stricken out on plaintiff's motion to strike the same; and all findings based thereon should be set aside.

POINT III

In a case such as this, where a foreign seaman was gravely injured on a foreign ship in an American port and treated at length in an American hospital, the Jones Act clearly requires that the case be fully tried before a jury and precludes dismissal as for lack of jurisdiction of the subject matter or on foreign law defenses without trial of plaintiff's Jones Act and American law claims.

1. The great question under the Jones Act reserved by this Court in *Plamals v. Pinar del Rio*, 1928, 277 U. S.

151, 155*, *supra*, and undetermined in either *Uravic v. Jarka*, 1931, 282 U. S. 234, *supra*, or in *Lauritzen v. Larsen*, 1953, 345 U. S. 571, *supra*, this Court stated as follows:

“whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters” (277 U. S. 155).

The very reservation of that question in *Plamals v. Pinar del Rio*, *supra*, is indicative of its importance and substantial character and that it is a question which this Court must review and settle.

The comparable question presented by petitioner's case is more specifically whether Section 33 of the Jones Act is applicable, where an alien seaman is injured on a foreign vessel in an American port and is treated therefor at length in an American hospital.

That question is a principal “subject matter” of the action against *Compania and Garcia*; its determination requires a full trial of the case on the merits before a jury; this precludes piece-meal trial of foreign law defenses, and precludes dismissal for lack of jurisdiction of the subject matter.

2. Four provisions of the Jones Act (Act of June 5, 1920, c. 250, 41 Stat. 988-1008, and of the Federal Em-

* *Plamals v. Pinar del Rio*, 1928, 277 U. S. 151, 155, *supra*, was the first case to reach this court involving a Jones Act claim of an alien seaman injured on a foreign vessel in the United States. A seaman on a British vessel sued in rem under the Jones Act. The District Court dismissed the libel at trial on the theory that the Jones Act was inapplicable and the British Compensation law applied. But this Court held instead that the Jones Act did not provide a lien enforceable by in rem proceedings; and this Court specifically left open the question whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters (277 U. S. 155).

employers Liability Act, April 22, 1908, c. 149, Sec. 5, 35 Stat. 66, incorporated thereby) are of tremendous importance, viz.:

(1) the first clause of both substantive provisions of Section 33:

"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury."

(2) the provisions of the Federal Employers Liability Act, Sec. 5 (45 U. S. C. Sec. 55) incorporated by Section 33 of the Jones Act that,

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

See "D" of Point II, *supra*, pages 37-38.

(3) the provision of Section 36 of the Jones Act (41 Stat. 1007):

"That if any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

(4) the public policy stated in the first section or preamble of the Jones Act (41 Stat. 988) and further evidenced in other provisions thereof as well as Section 33.

3. Of great importance in their interpretation also is the history of progress of H. R. 10378 through Congress, with the foregoing provisions added in a great body of amendments made to the bill following this court's decision in *Strathearn SS. Co. v. Dillon*, 1920, 252 U. S. 348; and the debate in Congress showing how fully Congress had in mind and intended fully to exercise the jurisdiction and power of the nation over foreign seamen and foreign shipping within ports of the United States.

4. H. R. 10378 was introduced in the House by Representative Green of Massachusetts on November 5, 1919 (Congressional Record, 66th Congress, First Session, p. 7998); debated (*Id.*, pp. 8142, 8173); passed (*Id.*, p. 8173), and referred to the Senate Committee on Commerce (*Id.*, p. 8267).

In the House, Representative Green stated at page 8142, that:

"I believe the question of the American Merchant Marine is the most important question that has been brought to the attention of this House,"

pointing out that:

"There were but seven American vessels in the overseas trade before the late war in 1914."

However, H. R. 10378 as thus introduced and passed in the House contained no provision comparable to Section 33 or either of the four provisions first above mentioned. This was notwithstanding that this court had held in *Chelentis v. Luckenbach S. S. Co.*, 1918, 247 U. S. 372, decided June 3, 1918, a year and five months before H. R. 10378, that Section 20 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1185 had created no cause of action for seamen injured through negligence. Hence, as will be further seen, it was not *Chelentis*

v. *Luckenbach S. S. Co.*, so much as *Strathearn S. S. Co. v. Dillon*, which inspired the scope and language of the Senate Jones Act amendments.

5. For, thereafter on March 29, 1920 this court decided *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 354, which sustained provisions of Section 4 of the Seamen's Act of 1915, c. 153, 30 Stat. 1164 which amended Revised Statutes Section 4530, as applicable to foreign seamen on foreign ships while in harbors of the United States, to enable them to demand one-half wages then earned, and providing that "and the courts of the United States shall be open to such seamen for its enforcement."

Respecting this provision, in the proviso making the statute applicable to seamen on foreign ships while in harbors of the United States, this Court said:

"The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. *The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the Courts of the United States, and, if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.*" (Italics ours.)

It is this reasoning which manifestly influenced the amendments proposed within 37 days thereafter to H. R. 10378.

Similarly, in *Strathearn S. S. Co. v. Dillon*—An Unpublished Opinion by Mr. Justice Brandeis, 69 Harvard L. Rev. 1179, 1189, Mr. Justice Brandeis had written:

“Furthermore, the last clause of the proviso, in declaring our courts open to such seamen, makes clear that the proviso applies to foreign seamen. Americans shipped as seamen on foreign vessels were already entitled to resort to our courts to enforce rights against the vessel. *The Falls of Keltie*, 114 Fed. 357; *The Neck*, 138 Fed. 144; *The Epsom*, 227 Fed. 158. Our courts of admiralty possessed, in the absence of treaty provisions to the contrary, jurisdiction also in controversies between a foreign vessel and her officers or crew; but our courts usually decline, as a matter of discretion, to entertain law suits by foreign seamen; *The Belgenland*, *supra*. By treaties with some countries, our courts were precluded from doing so. *The Salomoni*, 29 Fed. 534; *The Burchard*, 42 Fed. 608; *The Koenigin Luise*, 184 Fed. 170. Consequently foreign seamen needed a grant of the right to sue.” (Italics ours.)

Thereafter on May 4, 1920—just 37 days after the decision in *Strathearn S. S. Co. v. Dillon*, *supra*—the Senate Committee on Commerce reported out H. R. 10378 (Congressional Record, 66th Congress, Second Session, p. 6494) by report No. 573 with 149 proposed amendments including Section 33, then numbered Section 36*, as amendment No. 139.

And the above quoted provision from Section 33—that any seaman injured “may, at his election, maintain an action for damages at law, with the right to trial by jury”—is equally a provision which was not necessary and would be superfluous, as to American seamen, as was

* The section as proposed by the Senate did not include the venue clause later added by the House.

the provision emphasized in *Strathearn S. S. Co. v. Dillon*, *supra*; and therefore, equally "is of the utmost importance in determining the proper construction" of Jones Act Section 33 and manifests the purpose of Congress to give the benefit of Section 33 to seamen on foreign vessels injured in ports of the United States.

*If American seamen only were to be included by the Jones Act, it would have been necessary only to enact a provision that the Federal Employers' Liability Act should apply to American seamen, and without enacting at all the quoted first clause. For 28 U. S. C. Sec. 1331, without more, would then afford any American seaman jurisdiction of an action at law based on such a statute; and in an action at law under Sec. 1331 the American seaman would be entitled to a jury trial. The Seventh Amendment of United States Constitution, indeed, would guarantee jury trial.**

But with reference to a foreign seaman injured here, and requiring hospitalization and treatment here, the affirmative provision that he "may, at his election, maintain an action for damages at law, with the right of trial by jury" is highly significant and apt. For in his case this provision is effective to enable him to elect between Jones Act rights and foreign law rights, and thus preclude the tort feasons from defeating his action under the Jones Act by pleading as defense a different right and remedy under foreign law or foreign contractual provisions.*

In its Report No. 573 the Committee pointed out:

* It is significant that, by comparison, the Federal Employers' Liability Act itself contains no similar provision that the injured railway employee may at his election maintain an action for damages at law with a right of trial by jury—this, for the very obvious reason that he would have such right under 28 U. S. C. Sec. 1331 and the Seventh Amendment, once the liability provision, 45 U. S. C. Sec. 51, was enacted.

"Years ago our great commercial rivals said, 'To hell with American ships!' That spirit exists today . . .

That is what we must meet. We are going to meet it not in the spirit of destruction, but in the spirit of fair play and with a determination to secure our just portion of the world's carrying trade.

. . . . No halting, hesitating, doubting policy will succeed. We must take risks. We must encourage our capital and energy to go into this contest and assure them that we are behind them to build up and sustain rather than tear down. With this assurance no one can doubt our success.

. . . . Our ship owners and ship operators must be placed as nearly as possible on an equality in operating costs and operating conditions with their competitors. Unless proper steps are taken to do these things it will be but a short time until our fleet will be dissipated and our flag driven from the sea, and we will again be in the same dependent and humiliating position we were before the war. . . .

We assert the need of a merchant marine for national defense and for our commercial growth and declare it to be our policy to do whatever may be necessary to meet this need." (Senate Report No. 573, 66th Congress, Second Session, pp. 1-3.)

On unanimous consent H. R. 10378 with the proposed amendments was before the Senate as committee of the whole on May 10, 1920 (Congressional Record, 66th Congress, Second Session, p. 6803) and after debate was passed with amendments on May 20, 1920 with a request for conference with the House on the bill and amendments, with appointed conferees (*Id.*, p. 7420) for which the House appointed conferees May 22, 1920 (*Id.*, p. 7504).

. 6. Section 33 was not the only section amendatory of the provisions of the Seamen's Act in their application to foreign vessels.

Several amendatory sections preceding Section 33 affected foreign ships and foreign seamen in American ports; and these and resulting debate disclosed full familiarity of Senator Jones and others sponsoring the bill with the decision in *Strathearn S. S. Co. v. Dillon, supra*, and explanation by them of the purpose of the bill to utilize fully the power there recognized.

The first section or preamble, containing the statement of policy above mentioned was agreed to May 10, 1920 without debate (Congressional Record, 66th Congress, Second Session, p. 6505).

On May 14, at page 7306 an amendment to Revised Statutes Section 4530 was agreed upon to further tighten the effect in the case of foreign seamen and foreign ships. The *Strathearn S. S. Co. v. Dillon* decision, while treating the section as applicable to foreign seamen and foreign ships had interpreted its provisions as including "wages earned from the beginning of the voyage" (252 U. S. 357). Senator Jones explained the purpose of amendment to carry out the original intention, that whenever a seaman can make such a demand, he can demand half of what is due then and remaining unpaid (*Id.*, p. 7036). The following is quoted from page 7037:

"Mr. King: Does the Senator say that the Supreme Court has held that we have jurisdiction over the foreign seamen and foreign ships?"

Mr. Jones of Washington: Under the present statute we have such jurisdiction in our ports.

The Supreme Court held that act to be unconstitutional* only a short time ago.

Mr. King: A vessel, then, that sails under the Norwegian flag, for instance, with Norwegian sailors, if it touched at an American port for a day would be-

* Manifestly error for "constitutional". See last paragraph on page 7036, and see the *Strathearn S. S. Co. v. Dillon* decision.

come subject to the jurisdiction of our courts and the provisions of this proposed law, and the sailors could invoke the law for their protection?

Mr. Jones of Washington: Yes; while in an American port. It was one of the main contentions, the Senator from Utah will remember, in favor of the seamen's act, that it would, instead of placing a great burden on our seamen and shippers, bring the wages of the seamen of other countries up to a level with our own. This provision is intended to aid in carrying out that great purpose." (Italics ours.)

At page 7043 in reference to another amendment Senator Jones further said:

"The Supreme Court has upheld this section *and has also upheld the right of Congress to deal with foreign seamen in our ports.*" (Italics ours.)

Almost immediately following on page 7044, the amendment to add Section 36 (later numbered Sec. 33) was agreed to with no further discussion.

At page 7315 Senator Jones said with reference to what became Section 34 calling for abrogation of treaties restricting the right of the United States to impose discriminatory customs duties that:

"We are not seeking a war of retaliation but, Mr. President, we are not running away from it. As the Senator said, we are in a better position now to meet a war of retaliation."

In House Reports, numbers 1093, June 2, 1920, 1102 of June 3, 1920 and 1107 of June 4, 1920 (66th Congress, Second Session, 1919-1920, House Reports, Volume 3) the House proposed the venue clause.

On June 4, 1920 Senator Jones stated (Congressional Record, 66th Congress, p. 8470):

"I deem it just to say that the conferees from both sides of the chambers and from both branches of Congress have worked on this bill with the sole purpose of reporting to the Senate a bill that would build up the American Merchant Marine."

On June 4, 1920 at page 8599 Representative Green stated:

"I ask for the adoption of this conference report because I know that the American Merchant Marine will be firmly established after these bills have been enacted into law and if there is anyone here who does not favor this bill because of any reason, unless it be a very valid one, I propose to classify him who objects to this bill and who votes against its enactment into law as an affiliated agent of the British Lloyds and to put those who vote for the bill as valuable agents of the American Bureau of Shipping. (Applause.)

You can take your choice. I do not care how you vote, but you should not vote a penny to aid the British Lloyds, from the treasury of the United States."

On the same day, at page 8607 Representative Cameron said:

"Now, then, I want such American merchant marine. (Applause.) We cannot get it unless we follow a policy that will enable us with greater wages on the world's highway to sail ships. If we get a merchant marine we have to contrive some means to make up the difference between what it costs the world to sail on the world's highways and what it costs us."

7. It is thus apparent that the whole spirit in which H. R. 10378 (The Jones Act) was enacted was for utilizing to the full the national power and jurisdiction to impose on foreign ship owners in favor of foreign seamen while

in our ports, the same liability imposed on American ship owners so as to equalize, to the extent possible, the operating costs.

It is manifest also that this Court's decision in *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 348, thirty-seven days before the amendments of this character, including amendment No. 139 which became Section 33, were proposed in Senate Report No. 573 on May 4, 1920, was a principle inspiration for these provisions.

It is clearly manifest moreover, that the provision of Section 33 that "Any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages at law, with the right of trial by jury", was inspired by the reasoning in *Strathearn S. S. Co. v. Dillon* that no such provision was needed in the case of American seamen, whereas foreign seamen needed a grant of the right to sue; and that this clause had as its primary purpose the subjecting of foreign ship owners to liability for grave personal injuries sustained in American ports, and particularly where these then are treated at length in American hospitals.

8. As said in *U. S. v. Diekelman*, 1875, 92 U. S. 520, 525:

"The merchant vessels of one country visiting another for the purpose of trade subject themselves to the laws which govern the port they visit so long as they remain."

In *Stewart v. Pacific Steam Navigation Co.*, 3 F. 2d 329, 1924 A. M. C. 1272, Judge Learned Hand denied a motion to set aside the service of the summons in an action by a British seaman for injury sustained on the deck of a British vessel while it was passing through the Panama Canal. Rejecting a contrary construction that would give advantage to foreign ships as against American ships, he said:

"We all know that the purpose of Congress is directly the opposite."

In *Arthur v. Compagnie Generale Transatlantique*, 5 Cir., 1934, 72 F. 2d 662, the Fifth Circuit Court of Appeals reversed a District Court judgment which had dismissed for lack of jurisdiction an action under the Jones Act by a stevedore of unpleaded nationality, for injuries on a French vessel while discharging cargo in the harbor at Cristobal, Canal Zone, saying that "the right of action is given to all seamen regardless of nationality. Since the action arises under a law of the United States, diversity of citizenship is immaterial" (72 F. 2d 664).

In *Uravic v. Jarka Co.*, 1931, 282 U. S. 234, *supra*, this Court reversed the New York Court of Appeals and held a defendant employer liable under the Jones Act for death of a stevedore on a German vessel tied up at an American port. The Court distinguished the case of public armed vessels and, pointing to the fact that, as in *Wildenhus's Case*, 1887, 120 U. S. 1, crimes committed on private vessels are punishable by the territorial jurisdiction, said:

"We see no reason for limiting the liability for *ports* committed there when they go beyond the scope of discipline and private matters that do not interest the territorial power" (282 U. S. 240). (*Italics ours.*)

The Court said:

"The jurisdiction and the authority of Congress to deal with the matter are unquestionable and unquestioned. *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 124, *et seq.* The conduct regulated is of universal concern" (282 U. S. 238).

The Court rejected an argument that the venue clause and the lack of a lien "shows that seamen on a foreign vessel were not contemplated", saying:

"But the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its

face includes them . . . If the rule is wise there is no reason why it should not be universal. Wise or not, it is law and the question is why general words should not be generally applied. What would be the alternative? Hardly that the German law should be adopted. *It always is the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own*" (282 U. S. 239, 240). (Italics ours.)

8. Petitioner submits, moreover, that in every sense the case at bar on the merits is one involving torts which "go beyond the scope of discipline and private matters that do not interest the territorial power" (*Uravic v. Jarka Co.*, *supra*, 282 U. S. 240), and which are of intense interest to the territorial power and its citizens and are consequently within its Jones Act legislation.

The injury to petitioner herein was sustained during unloading operations while the vessel was tied up at a pier in Hoboken, New Jersey; i.e., while "in a practical sense, the ship . . . was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore", and "was due to hurried and imprudent unloading" (Cf. *The Germanic*, 1905, 196 U. S. 589, 597, 595).

Petitioner's left leg was severed and his right leg broken during the unloading operations on board the vessel while it was tied at the *American pier*, with *American workmen* as well as Spanish crew members aboard ship and involved in the tort. The injury and loss of blood placed petitioner at the door of death here in an *American port*. Spain or Spaniards could not save his life. An *American ambulance* rushed to the ship; took charge of petitioner and rushed him to an *American hospital*, under protection enroute of *American health, traffic and police regulations*.

He then was treated for *eight months in an American hospital*; the services of *American physicians, American*

surgeons and American nurses were required; it was necessary to obtain an artificial limb from an American source; and his amputated leg was buried in an American cemetery.

Of necessity, the American Government itself was obliged to take an interest. In order to permit extended American hospitalization essential to save the seaman's life, it was deemed necessary by immigration officials to reclassify petitioner to permit him to remain here to undergo hospitalization, and then to prosecute his claims to damages, instead of requiring him to depart as a foreign seaman within twenty-nine days after arrival, as would have been the case except for his tragic injury and extended and expensive treatment necessitated here. Both this and the prosecution of plaintiff's claims for damages have required the extended services of American attorneys for petitioner.

The bill of the American hospital for \$3,750.60, as well as bills of other Americans for medical services, for the artificial limb, and for the American burial of his amputated leg, all remain unpaid, and are liens on plaintiff's claims against defendants herein. All these items, owing to Americans and remaining unpaid, are part of the damages sought to be recovered in the American courts. Petitioner's American attorneys also are unpaid.

Three American companies, whose employees were on board the vessel and are charged with negligence, are defendants in the action.

The tort and its consequences thus are in every sense American, and within the Act both literally and as construed in Uravic v. Jarka Co., supra.

9. In *Uravic v. Jarka Co.*, this Court cited *The Schooner Exchange v. McFaddon*, 1812, 7 Cranch (11 U. S.), 116, 136, 143, 144-146, in which Chief Justice Marshall distinguished the case of merchant vessels in our ports from that of foreign national ships of war. It emphasized the exclusive and absolute jurisdiction of the

nation within its own territory and the full and complete power of the nation.

In *Wilson v. Girard*, 1957, 354 U. S. 9524, decided July 11, 1957, this Court cited *The Schooner Exchange v. McFaddon*, *supra*, in sustaining the jurisdiction of Japan to try an American soldier for the killing of a Japanese woman while he was on duty guarding, as a member of the American occupation forces in Japan, a machine gun and clothing at Camp Weir Range area, Japan. This was notwithstanding that American officials had originally claimed, under the provisions of the treaty with Japan, exclusive jurisdiction to try Girard and apply in his trial American law.

In *Wildenhus's Case*, 1887, 120 U. S. 1, 4-5, cited by this Court in *Urvic v. Jarka & Co.*, *supra*, this Court considered a Belgian treaty, Article XI of which reserved less from its waiver of jurisdiction than does Article XXIII contained in the Spanish Treaty of 1903 (Treaty Series, No. 422, reprinted by the Government Printing Office in February, 1954). Article XI of the Belgian treaty involved in *Wildenhus's Case* provided:

“Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed” (120 U. S. 18).

The Spanish treaty of 1903 in Art. XXIII more broadly excepted from any treaty waiver of American jurisdiction any disorder which should happen on board a Spanish vessel in the territorial waters of the United States

“when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew.”

Such waiver of jurisdiction as Art. XXIII contained was in large measure abrogated on July 1, 1916, in accordance with provisions of Sec. 16 of the Seaman's Act of March 4, 1915 (38 Stat. 1184), to which Sec. 33 of the Jones Act of June 5, 1920, c. 250, Sec. 33 (41 Stat. 1007) was an amendment. It provided for abrogation of "any other treaty provision in conflict with the provisions of this Act."

Article VI of the Spanish treaty also guarantees Spanish subjects "free access to the Courts . . . as well for the prosecution as for the defense of their rights."

As pointed out by Judge Brandeis in his unpublished opinion in *Strathearn S. S. v. Dillon, supra*:

"The decided cases illustrate how narrow are the extra territorial rights conceded by the United States to foreign merchant vessels; and the tendency to restrict them further is indicated by our legislation" (69 Harvard Law Rev. 1185).

Section 36 of the Jones Act (41 Stat. 1007) is indicative moreover that no case arising under its provisions is to be dismissed because any preceding case involving different circumstances has been dismissed or ended without recovery. For under Section 36 if the application of any provision of the Jones Act (and, therefore, the application of Section 33) "to certain circumstances be held invalid . . . the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby." See also *Rogers v. Missouri P. R. Co.*, 1957, 352 U. S. 500; *Ferguson v. Moore-McCormack Lines*, 1957, 352 U. S. 521

The provision of the Jones Act is not that any seaman may institute, subject to dismissal, but that he may "maintain" an action for damages at law, and this "with the right of trial by jury."

The petitioner, therefore, clearly is entitled to trial of his Jones Act claim.

POINT IV

Pendent jurisdiction; wage claim jurisdiction; diversity jurisdiction.

As respects both *Compania* and *Garcia*, the dismissal further conflicts in principle with *Hurn v. Oursler*, 1933, 289 U. S. 238; *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d 834, 840; *Nolan v. General Seafoods Corp.*, 1 Cir. 1940, 112 F. 2d 515, 517, and *Lindquist v. Dilkes*, 3 Cir. 1942, 127 F. 2d 21. For, with jurisdiction existing of the Jones Act claim, there would be pendent jurisdiction also of the claims against them under the general maritime law, even if such jurisdiction would otherwise not exist under 28 U. S. C. Sec. 1331, and even if the claims under the Jones Act were determined against petitioner on the merits.

The dismissal of the second cause of action which claims wages to the end of the voyage conflicts also with this Court's decision in *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 348, showing that the courts of the United States are open to foreign seamen for enforcement of such claims.

Even the holding that there was no diversity jurisdiction, petitioner submits, conflicts in principle with 26 U. S. C. A. Sec. 1332, and this Court's decisions in *Strawbridge v. Curtiss*, 3 Cranch (7 U. S.) 267, and *Indianapolis v. Chase Nat. Bank*, 1941, 314 U. S. 63. This is because the "matter in controversy" between petitioner and *Compania* (the only defendant as to whom diversity is lacking) involves the injury of an employee and claims therefor under the Jones Act and general maritime law of the United States and for maintenance and cure and unpaid wages under the maritime law of the United States, and is distinct from the "matter in controversy" against the third-party defendants for their own negligence.

POINT V

The unfair requirement that petitioner waive in advance any claim to law jurisdiction, as a condition to allowing admiralty jurisdiction.

If this Court should hold, as respects any of defendants, that only jurisdiction in admiralty or only diversity jurisdiction is available to petitioner, this Court should then determine whether the District Court, as guardian of its seaman ward, erred in requiring petitioner, at pre-trial hearing and in advance of the Court's determination of the great questions of jurisdiction herein, to elect whether to amend his complaint and proceed upon diversity or in admiralty, and in holding that petitioner "elected at the pre-trial hearing not to amend his complaint and proceed" upon diversity or in admiralty.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court for the Southern District should be reversed; plaintiff's objections to the evidence offered by defendants in support of their defenses should be sustained and plaintiff's motion to strike out such evidence and set aside the findings of the District Court based thereon should be granted; the motions of respondents to dismiss the complaint for lack of jurisdiction of the subject matter should be denied; and the case should be remanded to the District Court for trial under the Jones Act and American Maritime Law.

Respectfully submitted,

NARCISO PUENTE, JR.,
60 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.

Of Counsel:

SILAS B. AXTELL,
CHARLES A. ELLIS.

APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. III Sec. 2:

"The judicial Power shall extend to all Cases; in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; . . . —to all Cases of admiralty and maritime Jurisdiction; . . . —to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . . In all the . . . Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Art. VI, cl. 2:

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

The Judicial Code, 28 U. S. C. A. Secs. 1331-1335 and 1652 provide:

"1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

*Appendix.***"1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN
CONTROVERSY.**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subject thereof are additional parties

"1333. ADMIRALTY, MARITIME AND PRIZE CASES.

The District courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

"1652. STATE LAWS AS RULES OF DECISION.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Act of June 5, 1920, ch. 250, 41 Stat. 988, 1007, commonly called the Jones Act:

"CHAP. 250.—An Act To provide for the promotion and maintenance of the American merchant marine. to repeal certain emergency legislation, and provide

Appendix.

for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

.

"SEC. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"SEC. 20. That any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such

Appendix.

personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.'

• • • • •

"SEC. 36. That if any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

Spanish Treaty of 1902, Art. VI and abrogated Art. XXIII:

ARTICLE VI.

The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of their rights, in all the degrees of jurisdiction established by law. They can be represented by lawyers, and they shall enjoy, in this respect and in what concerns arrest of persons, seizure of property and domiciliary visits to their houses, manufactories, stores, warehouses, etc., the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored Nation.

ARTICLE XXIII.

Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have exclusive charge of the internal order of the merchant vessels of their Nation and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consul addressed in writing to either the Federal, State or Municipal Authorities in the United States, or the Authorities or Courts in Spain, and supported by an official extract from the register of the ship or the list of the crew, and the prisoners shall be held during the whole time of their stay in the port at the disposal of the consular officers. Their release shall be granted at the mere request of such officers made in writing. The expenses of the arrest and detention of those persons shall be paid by the consular officers.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.  **3**

FRANCISCO ROMERO,

Petitioner,

against

**INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA, also known as SPANISH
LINE and GARCIA & DIAZ, INC. and QUIN LUMBER
CO., INC.,**

Respondents.

PETITIONER'S REPLY BRIEF

**NARCISO PUENTE, JR.,
60 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.**

Of Counsel:

**SILAS B. AXTELL,
15 Moore Street,
New York 4, N. Y.**

**CHARLES A. ELLIS,
37 Wall Street,
New York 5, N. Y.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASAT-
LANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

PETITIONER'S REPLY BRIEF

This brief is in reply to seven opposing briefs (four by the four respondents and three by four *amici curiae*).

One of the *amici* briefs is jointly by a Norwegian *Federation* and a Swedish *Association* of *shipowners* which compete with and are opposed to the competitive interests of the American merchant marine and to our public policy. The other two *amici* briefs by the British Government and Danish Government similarly represent the competitive interests of the great British and Danish *shipowners*.

The seven opposing briefs contain no arguments in the interest of Norwegian, Swedish, British, Danish or Spanish *seamen*, or in the interest of American shipping, American seamen, American institutions, or American policy.

Because the briefs of Compania and the four *amici* represent only the competitive and baronial interests of the foreign shipowners, International Seamen's Federation of 634 Eighth Avenue, New York 18, N. Y. and International

Merchant Seamen's Service, Inc., of 19 Broad Street, New York 4, N. Y., requested permission to file *amici* briefs representing the opposed interests and views of foreign seamen.

And St. Mary's Hospital of Hoboken, N. J. requested permission to file an *amicus* brief representing the interests of American hospitals along our seacoast.

But the Clerk of this Court by letter of February 11, 1958 advised petitioner's counsel that the time for filing *amicus curiae* briefs "in support of the petitioner's position has long since expired."

I

The briefs of Compania and Garcia expressly and the others by their arguments and conclusions misrepresent the motions and the "pre-trial hearing" had below.

Compania's brief quotes the first, third and fourth defenses and states (p. 7) that prior to the suit being assigned for trial it moved "on the basis of these defenses, to dismiss the suit as against it," and again (p. 27) that application was made for a hearing "on these defenses" of lack of jurisdiction and "failure to state a claim upon which relief can be granted." Garcia's brief (pp. 6-7) even contends that "summary judgment" was granted because there was "no showing" of "neglect on its part contributing to petitioner's injury."

But as the Court stated and Mr. Quinlan, counsel for both Compania and Garcia confirmed, at the conclusion of the hearing, "So there will be no misunderstanding", the only motion by each defendant was "for a dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter" (R. 194a). See R. 2a, l. 13; R. 97a, ll.

9-15; R. 117a, l. 24. Compare the statement in Quin's brief (p. 2) that

"the defendants moved to dismiss the action in view of the court's lack of jurisdiction of the subject matter of this action".

In *The Mayor v. Cooper*, 1867, 6 Wall. (73 U. S.) 247, of such a motion (p. 249), this Court said, at page 254:

"The validity of the defence authorized to be made is a distinct subject. . . . *It has no connection whatsoever with the question of jurisdiction.*"

Nevertheless, all of the opposing briefs seek affirmance of the judgment which determined that petitioner had no enforceable "right"—a determination made, as the Quin brief states (p. 5) "Without allowing any proof as to the manner in which the accident occurred".

Compania's brief (pp. 9, 25) represents petitioner as contending that a full trial is a "prerequisite to consideration of the jurisdictional motion". But, quite the contrary, petitioner's brief actually contends (pp. 17, 20) that the motions to dismiss for lack of jurisdiction of the subject matter *should have been summarily denied*; that the Court's failure to distinguish between jurisdiction and merits deprived petitioner of his right to a trial of the merits in the manner prescribed by law (p. 33, *et seq.*); that only the issue of diversity could admit of evidence and findings on jurisdictional pre-trial hearing (p. 36); that the evidence taken on other issues related to the merits and should be stricken out and the findings set aside (pp. 33, 36, 58); and (p. 40 *et seq.*) that the Jones Act clearly requires that the case be fully tried before a jury and precludes dismissal for lack of jurisdiction of the subject matter or on foreign law defenses and without trial of plaintiff's Jones Act and American maritime law claims.

II

The misstatement of and misplaced reliance on the theory of a foreign law of the flag.

In a brief which does not even cite *Wildenhus' Case*, 1887, 120 U. S. 1, *Uravic v. Jarka*, 1931, 282 U. S. 234, or *The Schooner Exchange v. McFaddon*, 1812, 7 Cranch (11 U. S.) 116, the Norwegian Shipping Federation and Swedish Shipowners Association claim (at p. 5) that petitioner seeks to overrule *U. S. v. Flores*, 1933, 289 U. S. 137, and (at p. 27) that petitioner seeks to reverse cases applying the Jones Act to injuries sustained by American seamen on American vessels while in foreign ports.

The briefs of Compania. (pp. 14, 19) the Danish Government (p. 6) and the British Government (pp. 4, 6-8) also treat the theories of "law of the flag" and "law of the port" as though our law could embody only the one or the other for all purposes; and as though by applying in our courts our law to adjust claims affecting only Americans on an American vessel in foreign waters, the United States has in some unexplained way ceded its sovereignty over its ports and territorial waters.

The British Government brief (p. 6) even contends that this Court is bound to apply as respects British vessels in American ports a "law of the flag" theory such as the British courts themselves do not apply either to British vessels in foreign waters or to foreign vessels in British waters.*

* In *Carr v. Francis Times & Co.* (1902), A. C. 176 (H. L.), there cited Lord Macnaghten said:

"It was committed within the territorial waters of Muscat, which are, in my opinion, for this purpose as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway."

(Footnote continued on following page)

In *Chung Chi Cheung v. Rex* (1939), A. C. 160 (1938); 62 Ll. S. Rep. 151, after citing at page 168 and quoting with earnest approval from *Schooner Exchange v. McFaddon*, 7 Cranch 116 *supra*, the British Court said, at page 174:

"Their Lordships have no hesitation in rejecting the doctrine of extra-territoriality expressed in the words of Mr. Oppenheim, which regards the public ship 'as a floating portion of the "flag state".' However the doctrine of extra territoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts."

The arguments that the foreign "law of the flag" must be applied in this case is an effort to extend a fiction to a point which would be "dangerous". This would represent a judicial renunciation of American sovereignty, jurisdic-

(Footnote continued from preceding page)

In *MacKinnon v. Iberia Shipping Co.* (1954), 2 Lloyd's Rep. 372, also cited in the British Government brief (p. 6) Lord Carmont, citing numerous authorities, said, at page 375:

"These cases point conclusively to the *locus delicti* being the country having the territorial waters within which the ship was at the relevant time, and that it matters not a whit whether the vessel was navigating or at anchor, in a roadstead or tied up to a quay, and also, what is equally clear, whether the events founded on as the basis of the delict or quasi-delict are wholly internal to the vessel, or partly external to it as in the case of a collision between vessels in territorial waters".

At page 376, speaking of the Merchant Shipping Act, he said:

"Even where there is express application to British ships, as, for example, in Sects. 260 to 262, the sections may cover foreign vessels because the language used contains 'affirmative words merely and not negative words which can alone restrict some general application appearing elsewhere in the Act.'"

Lord Sorn said, at page 378:

"As regards the first point, I think that, for the purposes of the rule, no distinction is to be drawn between territory and territorial waters."

tion and policy within a portion of the United States where sovereignty and jurisdiction have always prevailed. Instead of a foreign ship making an "entry" into American territory on any arrival here, our inspection would become an invasion by our authorities of foreign territory whenever we entered upon or levied process against foreign ships. If a tort, as serious in consequences as this one, is without the "jurisdiction" of our Courts to investigate and adjudge as to liabilities under our law, it is difficult to conceive of any matter to which our law can apply as respects a foreign vessel in our ports.

The kinship between crime and negligence has been recognized. In *Jamison v. Encarnacion*, 1930, 281 U. S. 635, and *Alpha Steamship Corp. v. Cain*, 1930, 281 U. S. 642, this Court held that assault is Jones Act negligence. *Uravic v. Jarka*, 1931, 282 U. S. 234, held Jones Act Sec. 33 applicable where a longshoreman sustained injury due to negligence on a German vessel in the harbor of New York; and this Court cited *Wildenhus' Case*, 1887, 120 U. S. 1, where one Belgian crewman killed another Belgian crewman below decks on a Belgian vessel in the Port of Hoboken, and had then been indicted under a New Jersey state statute covering murder committed by "any person" in the state.*

Yet *New York Central R. R. Co. v. Chisholm*, 1925, 268 U. S. 29 and *Slater v. Mexican National R. R.*, 194 U. S. 120, clearly show that if either *Wildenhus* or *Uravic* had been across the border our law would have no application.

The argument of our opponents would treat the persons (Spaniards and Americans alike) involved in the *Romero tort* as though they were outside the United

*Of course, the New Jersey legislature had not foreseen one Belgian killing another on a Belgian vessel nor did the State Statute contain any statement that the Act should apply to foreign ships or foreign seamen. But this Court, on *habeas corpus*, found no difficulty in sustaining the New Jersey jurisdiction.

States and within Spanish sovereign territory while on board the *S. S. Guadalupe*, tied up at a Hoboken pier. For their argument is that either *U. S. v. Flores, supra*, 1933, 289 U. S. 137, must be overruled, or the foreign law of the flag must be enforced in our Courts.

However, both *U. S. v. Flores, supra*, 1933, 289 U. S. 137 at 157-158 and *U. S. v. Rodgers*, 1893, 150 U. S. 249, 260, on which it principally relies, expressly recognized that the law of the port can properly be applied by the Courts of that nation to matters occurring within its territorial waters, and that "This doctrine does *not* impinge on that laid down in *United States v. Rodgers, supra*" (289 U. S. 159), and applied in *U. S. v. Flores, supra*.

Neither set of decisions impinge in any way on the exclusive and absolute jurisdiction of the United States within its own territory, and the full and complete power of the nation over foreign merchant shipping in our territorial waters, expounded by Chief Justice Marshall in *The Schooner Exchange v. McFadden, supra*, 1812, 7 Cranch (11 U. S.) 116, 136, 143, 144-146, and applied in *Wildenhus' Case, supra*, 1887, 120 U. S. 1, 4-5; *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 348 and *Urawic v. Jarka Co.*, 1931, 282 U. S. 234, 239-240.

The Jones Act (Act of June 5, 1920, c. 250, 41 Stat. 988) in both *Sec. 31* and *Sec. 33* (41 Stat. 1006, 1007) employs the principles of law of the flag as to American vessels and law of the port as to foreign vessels in American waters.

The statute, R. S. Sec. 4530, involved in *Strathearn S. S. Co. v. Dillon, supra*, 1920, 252 U. S. 348 (decided 37 days before Report No. 573 of the Senate Committee on Commerce proposed both *Secs. 31 and 33*) employed in this manner both the law of the flag principle and the law of the port principle, both before and after its amendment by Sec. 31. It employed the law of the flag principle as

to American vessels by the provision as to

"Every seaman *on a vessel of the United States* . . . at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended."

And it equally employed the law of the port principle as to foreign vessels by the proviso that the section

"shall apply to *seamen* on foreign vessels while in harbors of the United States, and the Courts of the United States shall be open to such seamen for its enforcement."

Section 33 of the Jones Act equally employs both principles in the comprehensive permissive provision that

"Any seaman who shall suffer personal injury in the course of his employment *may, at his election, maintain an action* for damages at law, with the right of trial by jury."

Panama Railroad Co. v. Johnson, 1924, 264 U. S. 375, applied it as law of the flag where the injury occurred on an American vessel in foreign (Ecuadorian) waters. *Uravic v. Jarka Co.*, 1931, 282 U. S. 234, applied it as law of the port where the injury occurred on a foreign (German) vessel in an American port.

In *Panama Railroad Co. v. Johnson*, *supra*, this Court said:

"The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform" (264 U. S. 392). (Italics ours.)

In *Uravic v. Jarka Co.*, *supra*, where the ship was foreign but the *locus* here, this Court said:

"It always is the law of the United States that governs within the jurisdiction of the United States, even when

for some spécial occasion this country adopts a foreign law as its own. *The Exchange*, 7 Cranch 115, 136. *The Lottawanna*, 21 Wall. 558, 571, 572. *The Western Maid*, 257 U. S. 419, 432. *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 124. There hardly seems to be a reason why it should adopt a different rule for people subject to its authority because they are upon a private vessel registered abroad. They are not within the exception as to public armed vessels of a foreign sovereign, whatever its extent. *The Exchange*, 7 Cranch 115, 143. Crimes committed upon such private vessels may be punished by the territorial jurisdiction. *Wildenhus's Case*, 120 U. S. 1. *Patterson v. Bark Eudora*, 190 U. S. 169, 177. We see no reason for limiting the liability for torts committed there, when they go beyond the scope of discipline and private matters that do not interest the territorial power." (Italics ours.)

Where, therefore, Congress clearly has employed both theories in enacting, and this Court has employed both theories in construing Sec. 33 of the Jones Act, the argument that the one theory precludes the other is wholly without foundation.

III

This is not a case of internal economy and discipline of the vessel and of undisturbed peace, dignity, tranquility and economy of the port.

The briefs of *Compania* (pp. 14, 19), the British Government (pp. 6-8) and the Danish Government (pp. 4, 6) all claim that the tort involved only internal economy and discipline of a Spanish vessel and did not involve the peace or dignity of the country, the tranquility of the port, public policy, or economic interests of any Americans. This theory ignores both the facts and our Congressionally declared public policy.

The crime involved in *Wildenhuis Case*, 1887, 120 U. S. 1, did not, and no accident even to an American could more completely affect in its consequences the peace and dignity of the country, its public policy, the tranquility of the port, and domestic economy and economic interests of Americans than this accident. Eighteen features, each of which would be disturbing, combine as continuing disturbance.

1. Domestic peace, dignity and tranquility and economic interests of Americans were affected and disturbed as soon as Garcia & Diaz ordered that on this occasion the Spanish crew do the work of topping the booms which ordinarily and theretofore was properly done by specialized American longshore riggers. The American riggers were suddenly deprived of profitable work and income, and this while longshoremen and carpenters, fellow union members with the riggers and already on board ship, stood around angry and resentful. The potentialities were present of a labor brawl involving aliens and Americans in an American port; and of a possible strike tying up the port as to incoming cargo, with economic ramifications not only in the ports but which would affect the whole United States.

2. Whether vindictively or to get ready to descend through the hatch, some of the Americans kicked aside the metal lines which had been laid out carefully by Romero on the hatch cover.

3. Some of the alien seamen assigned to the rigging job, including the bosun in charge, were called away by Americans and left without giving instructions to the winchman not to operate the winch.

4. One leg of the man was completely severed by the line, his other leg broken and other injuries suffered in the presence and by reason of negligence of the alien crew members and Americans alike.

5. As soon as the accident occurred both Port Authority and Hoboken police were immediately called and rushed to the scene, and an American hospital, St. Mary's Hospital of Hoboken, New Jersey, was called for an emergency ambulance.

The emergency was a domestic emergency to which under American law the American police, Port Authority police and the American staff of St. Mary's Hospital were obliged to respond.

The hospital obligation was under American law, as was that also of those who telephoned the hospital and sought, while awaiting the ambulance, to save the seaman's life.

6. An American ambulance driver, stretcher bearers, doctor and nurse were instantly alerted in response to the emergency.

Their "peace" and "tranquility" were disrupted, and at break-neck emergency speed, with screaming sirens, they rushed in the ambulance to the pier where the ship was docked and the injured man was at point of death.

7. En route every interfering traffic right of other vehicles and individuals was suspended. The ambulance siren and traffic police officials en route enforced instantly and completely the right of way of the ambulance—all by reason of effective American law and custom respecting emergency and ambulance right of way. The peace and tranquility of every citizen along the right of way was disturbed.

8. On arrival the doctor, nurse, and stretcher bearers went on board the vessel and took immediate and effective control of the injured man—by virtue of their authority and function under American law.

9. They rushed back to the hospital with the injured man, again with sirens, police and police regulations

giving an enforced right of way to the ambulance regardless of every citizen's convenience en route.

10. The hospital staff had been alerted and worked under emergency preparing for the injured man's treatment. Surgeons and nurses were ready and immediately commenced administering to the man—work which was to continue for eight months.

11. Repeated blood transfusions were administered of American blood. Surgical operations were performed. Oxygen and drugs were administered. Last rites were administered by an American priest. For a considerable time at the hospital a twenty-four hour watch over the man was necessary.

12. Detailed police and Port Authority reports were made, certainly as necessary and important, if not more important than any ship's log entry.

13. The Hoboken police took the man's severed leg from the ship and kept it under police refrigeration for several days until it was made known that the man desired it to be buried in holy ground, and this was done in an American cemetery.

14. Immigration officials were obliged to reclassify the man, who otherwise must have shipped out within 29 days; and Immigration officials have been obliged to conduct hearings, grant extensions and keep track of the man ever since.

15. The hospital, its staff and the doctor, like the police, were in no position to bargain and haggle—they were functioning under American health and police law regulations; their duties, liabilities and rights were prescribed by American law. Had there been police misfeasance, or hospital, surgical or physician malpractice, their liabilities would have been under American law. Had any hospital equipment proved defective or drugs wrongly labeled or stale, or

had blood been wrongly classified for transfusion (cf. *Joseph v. W. H. Groves Latter Day Saints Hospital*, 1957, 318 P. 2d 330), the liability of manufacturers, druggists, blood bank and hospital would have been under American law. Their rights to be compensated for their services and the use of their facilities and provisions are under American law.

16. For eight months St. Mary's Hospital administered to the man; it treated him, maintained him, including artificial feeding during helplessness, and food, medicines and care for eight months.

17. The hospital bill alone amounts to \$3,750.60, no part of which has been paid.

18. Any competing American shipowner on whose vessel a similar tort occurred would be unquestionably liable in damages; and the economic welfare of the American merchant marine and the policy of our Government to do everything necessary to develop and encourage the American merchant marine would be undermined by holding that the competing foreign shipowners are not subject to similar liability in our ports and our Courts.

This accident disturbed the domestic peace and tranquility of the port, and economy of Americans.

The argument in *Compania's* brief (p. 5) that under Spanish law it "could not commit its insurer to charges here" "for if it did it could not be reimbursed for those charges by its compensation insurer" shows both the inadequacy of the Spanish law remedies proposed, and a callous attitude and intent by *Compania* which is intolerable to the law and institutions of America.

Compania's asserted theory is that both the hospital and the man can be paid only what its Spanish insurer dictates—with the rest of the expense incurred here to be

borne by the American purse. Its failure to pay anything whatever to the hospital to date is indicative of an intent to pay nothing of the American bills unless compelled by an American court.

The submission by the British and Danish Governments, the Norwegian Shipping Federation and the Swedish Shipowners' Association of briefs seeking affirmance of dismissal of the complaint upon representations and arguments supporting the position of respondent Compania magnifies the importance of what is at stake. It demonstrates that the governments and shipowners' associations of these four great foreign maritime countries wish the dismissal to stand as an American law precedent for the benefit of their own shipping interests.*

If this Court accepts the arguments of Compania and of the British and Danish Governments and the Norwegian Shipping Federation and Swedish Shipowners' Association, the precedent will be a license from the American judiciary to all foreign shipowners to follow a similar course; to compete ruthlessly with the American merchant marine without incurring any liability for injuries occurring in our ports, and to saddle on American hospitals, surgeons and physicians, police, municipalities, charities, taxpayers and public the burden of treating and caring for foreign seamen injured in our ports along our extended coastline—without recourse—all on the incongruous theory that only internal economy and discipline of a foreign vessel are affected by the tort and is none of our business, and neither subject to our laws nor within the jurisdiction of our courts. It also will place American shipping at a great disadvantage and defeat the opposite public policy declared by Congress.

* The brief of Norwegian Shipping Federation and Swedish Shipowners' Association (p. 4) deplores that "Unfortunately" the hospital bill has not been paid.

IV

The opposing briefs seek to have this Court defeat the Congressionally declared public policy by judicially re-establishing the "halting, hesitating, doubting policy" renounced by Congress.

When the Seamen's Act of 1915 was before Congress, Congressman Hardy had stated (52 Cong. Rec. 4646) that:

"If you do not have rules that restrict competitors of the American merchant marine to the full extent and just as you restrict the American merchant marine, you never can have an American merchant marine." (Italics ours.)*

House Report No. 645 (62nd Cong. 2d Sess.) stated (p. 7):

"Two things are essential to the building up of our merchant marine; one is the creating of a condition where the initial cost of the vessel is as low as that of the foreign vessel and the other is an equalization of the operating expenses." (Italics ours.)

When five years later the Jones Act bill, amending and practically rewriting H. R. 10378, was reported out by Report No. 573 of the Senate Committee on Commerce, it was in a spirit of vigorous Americanism, "with a determination to secure our just portion of the world's carrying trade". The committee stated that

"Our shipowners and ship operators must be placed as nearly as possible on an equality in operating costs and operating conditions with their competitors." (Italics ours.)

* The Furuseth Calendar," pages 25-29 of *A Symposium on Andrew Furuseth*, shows the progress of seamen's rights from 1854-1941. See also Furuseth's "Freedom Under the American Flag" and "Call to the Sea," *Id.* pages 19, 24.

The Jones Act was entitled as "An Act To provide for the *promotion and maintenance of the American merchant marine . . . and for other purposes.*" In *Panama R. R. Co. v. Johnson*, 1924, 264 U. S. 375, 389, this Court accordingly said that Sec. 33 was enacted

"as part of an act the *express object* of which was to provide for the promotion and maintenance of the American merchant marine."

Section 1 of the Jones Act (now 46 U. S. C. A., Section 861) as proposed and enacted provides that:

"*it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.*" (Italics ours.)

Section 1 of the Merchant Marine Act of May 22, 1928, c. 675, 45 Stat. 689, now 46 U. S. C. A., Sec. 891, declares that:

"The policy and the primary purpose declared in Section 861 of this title are hereby confirmed."

The Act of June 29, 1936, c. 858, Secs. 204, 904, 49 Stat. 1987, 2016, retained the declaration of policy in the Jones Act, 46 U. S. C. A. Sec. 861, and made a similar declaration of policy in Section 101, 49 Stat. 1985 now 46 U. S. C. A. Sec. 1101.

It is in this sense that the *Committee on Commerce* stated in the abstract quoted in the brief of the Norwegian Shipping Federation and Swedish Shipowners' Association (p. 21) that "No *interests*, but *American interests* have been kept in view", and that "if *our business* is to be cared for, we must do it."

This means that just as the interests of American seamen were kept in view in burdening American shipping with liability for their injuries; equally the interests of American shipping were kept in view by burdening competing foreign shipping with equal liability for injuries to foreign seamen within our ports.

As had been pointed out on page 6 of the Government's brief submitted in *Strathearn S. S. Co. v. Dillon*, 1920, 252 U. S. 348 (No. 373, October Term, 1919), an 1884 effort by Act of June 26, 1884, c. 121, 23 Stat. 53, to equalize costs by the opposite method of reducing American standards to the foreign level "had failed of the desired results." That act had been entitled "An Act to remove certain burdens of the American Merchant Marine and encourage the American foreign carrying trade, and for other purposes."

The same word "*encourage*" used in that title was used in the term "*develop and encourage*" in the declaration of policy in Section 1 of the Jones Act. This fundamental object was the same, the method only being opposite.

When proposing in Report No. 573 to follow in the Jones Act the opposite course successfully followed in the Seamen's Act of 1915 of raising the "operating costs and operating conditions" of foreign shipping to equalize "as nearly as possible" the American operating costs and operating conditions, the Committee warned that if this were not done "it will be but a short time until our fleet will be dissipated and our flag driven from the sea, and we will again be in the same dependent and humiliating position we were before the war".

The policy declared by Congress "to be the policy of the United States" is, of course, the policy of the whole United States. It is the policy for every state and every branch of the Government of the United States, including the judicial branch. It is the policy for both State and

Federal Courts including this Court and the United States District Courts and Courts of Appeals.

Every part of the Jones Act, including Section 33, therefore, is to be construed and given effect by Courts, themselves bound "to do whatever may be necessary to develop and encourage the maintenance" of the American merchant marine, and to place American shipowners "as nearly as possible on an equality in operating costs and operating conditions with their competitors."

The Committee stated that "*No halting, hesitating, doubting policy will succeed*". See Comm. Rep. 573—Pet. Brief 47.

But it is precisely such a "*halting, hesitating, doubting policy*" which the opposing briefs urge; and which Judge Sugarman assumed to exist in making his anguished reference to what he assumed to be "all of these complex, confounding and complicated situations involving jurisdiction under the Jones Act . . . where the injury takes place in our territorial waters" (R. 99a).

The lower courts, however, must not be permitted thus to reestablish and apply such a "*halting, hesitating, doubting policy*" to judicially *construe* Section 33 as excluding foreign shipowners from liability for injuries sustained in our ports and treated in our hospitals, and thereby judicially *defeat* the Congressional policy. "A construction which would lead to such a result cannot be sound" (cf. *Martin v. Hunter's Lessee*, 1816, 1 Wheat. (14 U. S.) 304, 329).

The opposing briefs do not, as they could not, contend that the Jones Act contains anything to show that Congress "*intentionally excluded*" a tort such as this "*from a description that on its face includes*" it (*Uravic v. Jarka*, 1931, 282 U. S. 234, 239), or intended to exempt competitive foreign shipping from this burden which American shipping must bear.

Their common effort instead is to persuade this Court that *the Court by construction* should judicially exclude them, where Congress has not, and this in order to afford them precisely the competitive advantage of the lower operating costs and compensation provisions under which foreign shipping competes with our own shipping, and which Congress intended to prevent.

The Congressional purpose was to *equalize* operating costs "as nearly as possible." The opposing briefs would have the Court instead enforce in favor of competing foreign shipowners an *inequality* wherever "possible".

This Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 59, and *Kernan v. American Dredging Co.*, 2 L. Ed. 2d 382, decided at this term and not yet officially reported, significantly contrasted "public policy" antedating FELA and (speaking of "the effective defenses of assumption of risk and contributory negligence" which FELA removed), said in *Kernan*:

"This limited liability derived from a *public policy*, designed to give maximum freedom to infant industrial enterprises, 'to *insulate* the employer as much as possible from bearing the "human overhead" which is an *inevitable part of the cost*—to some one—of the doing of industrialized business'. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 59."

When we compare the dual purposes of Congress, in enacting the Jones Act, (1) to establish the reverse policy of having the shipowner bear this "inevitable part of the cost," and (2) to place our shipowners and operators "as nearly as possible on an equality in operating costs and operating conditions with *their competitors*", they are completely incompatible with any intention that the Jones Act, nevertheless, should by *construction* be made to "in-

sulate" competing foreign owners of ships in our ports from bearing like costs of torts occasioned here.

This Court also has recognized as proper reason for policy a purpose "to *discourage negligence* by making wrongdoers pay damages" (*Bisso v. Inland Waterways Corp.*, 1954, 349 U. S. 70, 91), saying that "The dangers of modern machines make it more necessary that negligence be *discouraged* (349 U. S. 91). "The Act . . . is intended to stimulate carriers to *greater diligence* for the safety of their employees" (*Jamison v. Encarnacion*, 1930, 281 U. S. 635, 640).

The construction that owners of foreign flag vessels seek here, an insulation against liability for negligent acts performed here, will encourage negligence and increase the number of helpless seamen who our taxpayers must support.

Progressively there is developing the very "dissipation" of our own merchant marine that Senator Jones warned against—this, by reason of the judiciary's failure to enforce as fully as possible the public policy of the Jones Act.

Since Sec. 33 of the Jones Act incorporated all of FELA (*Kernan v. American Dredging Co.*, *supra*), it clearly incorporated Sec. 5 (now 45 U. S. C. Sec. 55). This is recognized in *Jamison v. Encarnacion*, 1930, 281 U. S. 635, at 639. Hence, with the Jones Act properly applied to all these torts occurring here, no "contract, rule, regulation or device whatsoever" can be relied on to defeat either jurisdiction or an equalizing liability.

The very point made in the British Government brief (p. 5) that "one foreign seaman injured in an American port would have . . . a quantum of recovery much in excess of other seamen serving on the same vessel under the same articles who had been injured on the vessel at other than an American port"* shows that such Sec. 33

liability is within the expressed object of the statute and will promote—whereas an opposite construction will defeat—the basic policy, purpose and intent of Congress.

The argument seeks to have the judiciary enforce a limitation of costs the foreign owner can be held for here, to such as he would incur abroad if he never competed here, instead of the equalization of costs here which Congress intended must be made.

The cost to the competing foreign shipowners of judgment rendered here will *not* exceed the cost our American shipowners are burdened with; and “*equalization*” of that cost as nearly as possible is the declared purpose of the statute. Any influence of this on foreign seamen *not* injured here could but aid in promoting that purpose by ultimately causing foreign owners to raise their standards to equalize our own.

In making the argument, counsel for the British Government evidences no interest whatever in the welfare of the “other seamen” mentioned; but simply a competitive undisguised interest in defeating, and, an undisguised effort to defeat the policy of equalization declared by Congress, so as to enable competing foreign owners to continue to compete without incurring costs equal to those borne by the American merchant marine.

The argument in the briefs of the Danish Government (pp. 3-4) and the British Government (p. 4) concerning their and Spain’s economic factors allegedly differing from American and that “What might seem a minor extra burden to the United States could be a major disaster to Danish shipping and hence to Denmark’s entire economy” (Danish Government brief, p. 4)—begs the question. We have nothing, moreover, but counsel’s statement in

* Is this not inevitable in view of the greater costs to hospitals and maintenance agencies of treating and caring for the people injured here?

the brief that such would be the case. If it be a fact, Congress must have had the fact in mind in establishing the public policy of equalization of costs. It is an argument wrongly addressed to the Court instead of to Congress or the treaty making power. It is, moreover, a strictly baronial argument; and its very advancement proves the point emphasized so earnestly by Senator Jones of the necessity of requiring competing foreign shipowners respecting matters occurring in American ports to bear resulting costs equally with American shipping.

Peculiar, indeed, is the argument in the brief of the Norwegian Shipping Federation and Swedish Shipowners Association (pp. 22-24) that to allow petitioner to recover under the Jones Act would indirectly "subsidize" the American Merchant Marine by resort to "subterfuge". If judicial "subsidy" or "subterfuge" be called for by either proposed construction of the Jones Act, it is our opponents who seek it for the *competitors* of the American Merchant Marine—directly contrary to the policy declared in the Jones Act and to Representative Green's remarks quoted on page 50 of petitioner's main brief.

The misrepresentation of petitioners contention that, in light of *Strathearn S. S. Co. v. Dillon*, the first clause of Section 33 makes clear that the section applies to foreign seamen injured here.

The briefs of Quin (p. 8) and of the Norwegian Shipping Federation and Swedish Shipowners Association (p. 26) represent petitioner as contending that as respects American seamen there was no need to enact the *Jones Act* and that the *Jones Act* was superfluous as to American seamen.

This is a calculated misrepresentation of petitioner's contention—a tactic that would not have been used if they had been able to devise any effective refutation of petitioner's actual contention.

Petitioner in both his petition and his brief has contended that, while as to *American* seamen it was necessary to enact a provision (in substances such as the second clause of Section 33) to make the *Federal Employers' Liability Act* applicable to seamen, this was all that was necessary as to *American* seamen; that, by contrast, the first clause of *Jones Act* Section 33—providing that "any" seaman "may, at his election, maintain an action for damages at law with the right of trial by jury"—was unnecessary and superfluous as to *American* seamen, since they would have such election and right to a jury trial under the Constitution and Judicial Code if and as soon as the *Employers' Liability Act* was made applicable; and that, as held of a comparable provision, superfluous to *American* seamen, in *Strathearn Steamship Co. v. Dillon* (1920), 252 U. S. 348, 354, the enactment of the "first clause" of Section 33, superfluous to *American* seamen, was for the purpose of permitting suit under Section 33 by foreign seamen when injured on foreign vessels in ports of the United States.

For *American* seamen, it would have been sufficient to enact a statute to provide:

That all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply in cases of personal injury suffered by seamen in course of their employment.

If the statute had been enacted in that form with nothing more, an action at law with a right of trial by jury could then be maintained under such statute by an American seaman by virtue of the Judicial Code provision, 28 U. S. C. A. Sec. 1331, without any necessity whatever for enacting the first clause of Sec. 33 to so provide.

In other words, once a substantive liability or right to damages were provided for by a Federal statute, the Judicial Code and Seventh Constitutional amendment would then effectively insure to any *American* seaman the right to maintain an action at law thereon with the right of trial by jury.

Moreover, the Federal Employers' Liability Act itself provides for concurrent jurisdiction of the State and Federal law courts (45 U. S. C. Sec. 56). Hence, all that was needed in the case of American seamen was the substantive provision to make the Federal Employers' Liability Act applicable to seamen.

A statute so worded without more, also might properly be applied by our courts to the case of a foreign seaman injured on a foreign vessel in an American port, especially when treated for months in an American hospital which remains unpaid. "*The existence of jurisdiction in all such cases is beyond dispute*" (*The Belgenland*, 1885, 114 U. S. 355, 365); but its exercise might then have been discretionary, or controlled by a previously existing treaty (*Id.* 114 U. S. 364-365; see also *Strathearn S. S. Co. v. Dillon*—*An Unpublished Opinion by Mr. Justice Brandeis*, 69 Har-

vard L. Rev. 1179, 1189, quoted in Petitioner's main Brief, p. 45). As stated by Mr. Justice Brandeis:

"Consequently *foreign* seamen needed a *grant of the right to sue*" (69 Harvard Law Rev. 1189).

It, therefore, was necessary in the case of only *foreign* seamen, but "superfluous" in the case of American seamen, to embody in the statute the *first clause* reading:

"That *any* seaman who shall suffer personal injury in the course of his employment *may, at his election, maintain an action for damages at law, with the right of trial by jury.*"

Any purpose to force American seamen to elect whether to rest his action on negligence or on unseaworthiness is incompatible with the liberal principles of both the Jones Act and the maritime law and "seems impossible to reconcile" with *Baltimore S. S. Co. v. Phillips*, 1927, 274 U. S. 316. (See *Remedies for Personal Injuries to Seamen, Railroadmen and Longshoremen*, 71 Harv. L. Rev. 438, 454.)

Congress Gave Individual Seamen Choice of Forum.

As to foreign seamen only, it was necessary in this manner to substitute for the Court's discretion an unqualified permission for any seaman "at his election" to "*maintain an action*" to enforce the substantive right. The policy and purpose of Congress was to equalize "as nearly as possible" the operating costs and operating conditions of "our shipowners and ship operators" with those of "their competitors". Giving the injured man "his election" would accomplish this; for he would not elect a foreign remedy unless it were better, in which case the Congressional purpose would be equally accomplished thereby.

A situation almost exactly parallel had been involved in the proviso amendment to R. S. Sec. 4530 construed in *Strathearn S. S. Co. v. Dillon*, *supra*, 252 U. S. 348, decided

37 days before the Committee on Commerce submitted its Report No. 573 proposing the Section first numbered 36 but later numbered 33 and other amendments to H. R. 10378 to apply the principles of that decision.

In the statute construed in *Strathearn S. S. Co. v. Dillon*, *supra*, 1920, 252 U. S. 348, the old section (R. S. Sec. 4530) long had been *limited* to

"Every seaman on a vessel of the United States."

This clause, therefore, did not include either Americans or foreigners who were seamen *on foreign vessels*. A proviso then had been added containing two clauses² reading:

"That this section shall apply to *seamen on foreign vessels while in harbors of the United States,*

and the Courts of the United States shall be open to such seamen for its enforcement."

On argument numerous briefs had pointed out that the first clause of the proviso was necessary in order to provide for the thousands of *American* seamen³ who shipped on "foreign vessels" and who had not been covered by the prior or preceding provision limited to "Every seaman on a vessel of the United States". From this it was argued strongly that in absence of any express reference to "*foreign*" seamen this proviso was limited to *American* seamen on foreign vessels.⁴

¹ Compare the *unlimited* Sec. 33 language:

"Any seaman who shall suffer personal injury in the course of his employment".

² Compare the use of the two-clause device in Sec. 33.

³ Compare the necessity to *American* seamen of the *second* clause of Sec. 33.

⁴ Compare the opposing arguments herein that the failure to use the specific term "foreign seamen" in Sec. 33 limits it to *American* seamen.

It was in rejecting this argument that the Court emphasized the "*utmost importance*" (p. 354) of the "*latter provision*" of the proviso. For while the proviso clause extending the Act was necessary for *American* seamen, on foreign vessels, the "*latter*" or enforcement clause was *not* necessary for *American* seamen, who would have the right without it to enforce the substantive clause by suing in the United States Courts. The "*latter*" or enforcement clause, therefore, the Court said, would have been "*superfluous*" if the intention of Congress was to "*limit*" the proviso to American seamen on foreign vessels.

Comparing this "*latter*" or enforcement clause of the R. S. Sec. 4530 proviso with the first or enforcement clause of Jones Act. Sec. 33, their substance, function and "*utmost importance*" thus is identical;

R. S. Sec. 4530:

"the courts of the United States shall be open to such seamen for its enforcement"

Jones Act Sec. 33:

"*Any seaman . . . may, at his election, maintain an action for damages at law with the right of trial by jury*".

Of course, the word "*seaman*" in each of the two enforcement provisions also includes American seamen; but the significant fact, in the one statute equally as in the other, is that "*no such provision was necessary as to American seamen . . . and, if it were the intention of Congress to limit the provision of the Act to American seamen, this feature would have been wholly superfluous*".

The attempt in the brief of Norwegian Shipping Federation and Swedish Shipowners Association (pp. 26, 27) to distinguish the two statutes by reason of the specific mention of "*seamen on foreign vessels*" in the R. S. Sec. 4530 proviso overlooks the fact that this was necessitated by leaving in that statute the express *limitation* of the preceding clause to "*Every seaman on a vessel of the United States.*"

Section 33, by contrast, never contained such a limiting phrase. The inquiry in such brief (p. 26) "why specific language was not included in the Jones Act similar to that to be found in the wage statute" applies equally, therefore, to this failure to include in Jones Act Sec. 33 the specific wage-statute limiting language:

"Every seaman on a vessel of the United States."

The answer is obvious. The draftsmen of Sec. 33 were starting unhampered by either form of limited specification but with the benefit of the recent *Strathearn S. S. Co. v. Dillon* decision, and used instead the comprehensive term "Any seaman" so as to avoid the complexity of R. S. Sec. 4530 and accomplish by that one comprehensive term and the grant of permission to sue what the two limited specifications in R. S. Sec. 4530 accomplished.

In comparing the two statutes and construing Jones Act Sec. 33 in light of the *Strathearn S. S. Co. v. Dillon* decision, therefore, the fact of "utmost importance" is that in Sec. 33 Congress both used a comprehensive term and included the provision which was superfluous as to American seamen but was needed by foreign seamen—viz., a grant to "Any seaman" of permission "at his election" to maintain an action.

Comparing FELA (45 U. S. C. Sec. 51 et seq.) the use of the permission provision in Jones Act Section 33 notwithstanding the absence of any permission provision in FELA is very significant. It was used in Section 33 to fill some need or necessity for permission to sue which was not present in FELA. This need or necessity for permission to sue could only have existed with reference to foreign seamen on foreign ships. There was no comparable group of foreign railway employees on foreign railroads to be affected by FELA. FELA is strictly a territorial statute operative only in the United States (*New York Central RR. Co. v. Chisholm*, 1925, 268 U. S. 29); and all employees affected were those employed by and who worked for the rail-

roads within the United States. None of them, therefore, needed to be given by FELA permission at their election to "maintain an action" at law on the substantive rights being created by FELA. Equally American seamen did not need to be given by the Jones Act permission at their election to "maintain an action" at law on the substantive rights being created by the Jones Act. The permission to maintain an action for damages at law embodied in Section 33 was for that class who in sea life needed it, namely any foreign seamen who might be injured in our territorial waters. When it is borne in mind that the very process used by Congress here was the incorporation of FELA, which did not contain such a permissive provision nor affect any class which needed permission to sue, the inclusion in Section 33 of both a comprehensive term and *permission to sue* evidences that the statute applies to foreign seamen who were the only seamen who needed a grant of permission to sue.

VI

The basic Jones Act purpose is not negated, defeated or impaired by either the venue clause or the failure to grant a lien.

The brief of the Norwegian Shipping Federation and Swedish Shipowner's Association (pp. 21-22) argues that the venue clause in Section 33 prevents application of the statute to most foreign shipowners, and that this and the failure of Congress to provide a lien for enforcement of Sec. 33 by *in rem* proceedings indicate a purpose not to make foreign shipowners liable at all.

It should be sufficient to note that both these arguments were advanced and expressly rejected in *Uravic v. Jarka Co.*, *supra*, 282 U. S. 234, at 239. But there are further reasons showing the complete fallacy of the argument.

This venue provision is "to be construed and applied in harmony with the general statute" as to venue in the

Judicial Code (*Panama Railroad Co. v. Johnson*, 1924, 264 U. S. 375, 384). And 28 U. S. C. A. Section 1391 unqualifiedly provides:

“(c) An alien may be sued in any district.”

See Act of March 3, 1911, c. 231, Secs. 50, 51, 36 Stat. 1101, and Revised Statutes Sections 737, 739; *In re Hohorst*, 1893, 150 U. S. 653, 662 (involving suit against *Hamburg-American Packet Company*, a German steamship corporation); *Barrow Steamship Co. v. Kane*, 1898, 170 U. S. 100, 112 (suit against a British steamship corporation).

It, therefore, was wholly unnecessary to add any venue clause for actions against foreign owners; since by the basic venue statute they could be sued “in any district.”

The clause actually added (by House amendment) was to *convenience American owners*, in furtherance of the expressed object and declared policy of the Jones Act to promote, develop and encourage the maintenance of the American merchant marine. It is, therefore, paradoxical to argue that a venue clause added for such a purpose can itself be taken as indicating opposite intention to give instead a competitive advantage to competing foreign shipowners by excluding them entirely from any of the costs of a tort liability such as placed on the American shipowners by the Act.

Congress, moreover, did not intend by the statute to discriminate against foreign shipowners any more than against American shipowners. The purpose was to meet competition by placing American shipowners and operators “as nearly as possible on an equality in operating costs and operating conditions with their competitors” (Senate Report No. 573, quoted at p. 47 of Petitioner’s main Brief).

Foreign seamen, moreover, were not to be afforded rights *superior* to those of American seamen. To grant a *lien* to *foreign* seamen would, therefore, in this spirit, re-

quire granting a lien also to American seamen. And this, the Court said in *Plamals v. Pinar del Rio*, 1928, 277 U. S. 151, would not be in keeping with "An Act to provide for the promotion and maintenance of the American Merchant Marine." Compare *Remedies for Personal Injuries to Seamen, Railroadmen and Longshoremen*, 71 Harvard L. Rev. 438, 455-458, 464.

The premise for the argument, moreover, is false; a lien was not necessary for an effective remedy against foreign shipowners. As long ago as *The Hine v. Trevor*, 1866, 4 Wall. (71 U. S.) 555, at 571, and *The Belfast*, 1868, 7 Wall. (74 U. S.) 624, 645, this Court pointed out the availability of *attachment* in actions at law, as distinct from the *in rem* proceeding peculiar to admiralty. Attachment can be as effective against the interest of the owner as *in rem* process; the major difference being that attachment affects only the interest of the party sued as defendant, whereas the *in rem* proceeding is against the vessel itself, regardless of who may be owner. A lien, moreover, being secret, is *stricti juris* (*Plamals v. Pinar del Rio*, 1928, 227 U. S. 151 and cases cited). Section 33 was not intended to be strictly construed, as the grant of a lien might have caused some courts to hold.

An *in rem* proceeding, moreover, could be maintainable only in admiralty; and Congress was concerned primarily with assuring to all seamen, foreign or American, a cause of action for negligence, with permission, for its enforcement, to "maintain an action for damages *at law* with a right of trial by jury." A lien, enforceable only in admiralty, could not be enforced in an "action for damages at law with a right of trial by jury."

VII

The misinterpretation of and misplaced reliance on dicta quoted from *American Insurance Co. v. Canter*.

For jurisdictional purposes, under 28 U. S. C. Sections 1331 and 1333 the distinction is between "cases" processed at law or in admiralty, and not, as respondents contend, between two branches of Federal substantive law.

In contesting jurisdiction at law under 28 U. S. C. Sec. 1331, of the claims based on American general maritime law, the briefs of Quin (p. 10) and Compania (pp. 30-31), like Judge Medina in *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2 Cir. 1955, 221 F. 2d 615, rely primarily on misunderstood dicta quoted from *American Insurance Co. v. Canter*, 1828, 1 Pet. (28 U. S.) 511, 545, on a question as to admiralty jurisdiction under statutory words "cases arising under the laws and Constitution of the United States", respecting which this Court in *The City of Panama*, 1879, 101 U. S. 453, 458, said:

"Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way."

* *American Insurance Co. v. Canter*, 1828, 1 Pet. (28 U. S.) 511, was a case in admiralty, wherein the sole question was whether admiralty jurisdiction within the Florida territory acquired by treaty from Spain was lawfully granted by the territorial legislature to and lawfully exercised by a court established by the territorial legislature under powers extending to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States" (28 U. S. 543-544).

This Court held that "the act of the territorial legislature, erecting the court by whose decree the cargo of the Point à Petre was sold, is not inconsistent with the laws and Constitution of the United States, and is valid" (28 U. S. 546). The Court overruled a con-

(Footnote continued on following page)

The *Paduano* decision and the briefs of Quin and Compania, nevertheless, would have us believe that, under *American Insurance Co. v. Canter*, *supra*, 28 U. S. C. Sec.

(Footnote continued from preceding page)

tention that there was an *admiralty* jurisdiction of the Superior Court of the territory which was exclusive under a Congressional Act giving the Superior Court "the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which . . . was vested in the Courts of the Kentucky district". It stated the "question suggested" by this as follows:

"Is the *admiralty* jurisdiction of the district courts of the United States vested in the Superior courts of Florida, under the words of the 8th Section, declaring that each of the said courts 'shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States', which was vested in the Courts of the Kentucky district? . . . Is a case of *admiralty* of this description?" (28 U. S. 545).

It was in reference to this that the Court made the statements quoted in the *Paduano* decision (*Paduano v. Yamashita Kisen Kabushiki Kaisha*, 2 Cir. 1955, 221 F. 2d 615, footnote 8) and in the briefs of Quin (pp. 10-11) and Compania (p. 31) herein.

In contrast this Court in *The City of Panama*, 1879, 101 U. S. 453, 458, affirmed a decree in *admiralty* for damages for personal injury to a passenger, upon libel *in rem* filed in the District Court of the Territory of Washington, saying:

"Beyond all question *admiralty* jurisdiction, including jurisdiction in prize cases, was vested in the territorial district courts by the ninth section of the organic act, the explicit language of the act being that the district courts of the territory should have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the territory.

Earnest effort is made in argument to show that inasmuch as a case in *admiralty* does not strictly arise under the Constitution and laws of the United States, that the clause of the organic act referred to does not vest jurisdiction to hear and determine such cases in the territorial district courts, for which proposition they refer to one of the decisions of this Court. *The American Insurance Co. v. Canter*, 1 Pet. 511, 546.

Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the Court is explicitly and undeniably the other way" (101 U. S. 458).

1333, and the third clause of Art. III, Sec. 2 of the Constitution mean that *rights* under Federal maritime law can be enforced in the Federal courts only in admiralty.

But what Chief Justice Marshall was discussing in the *American Insurance Co. v. Canter* case, was:

"The Constitution and laws of the United States give jurisdiction to the district courts, over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. We are, therefore, to inquire, whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical. . . . The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity" (1 Pet. 545). (Italics ours.)

Since the Constitutional provision (Art. III, Sec. 2) actually specifies "*Cases in Law and Equity*, arising under" etc.; the dicta would have been clearer had he used such term in distinguishing, as he was doing, "*cases of admiralty and maritime jurisdiction*" and "*Cases in Law and Equity.*" Compare *The City of Panama*, *supra*.

For purposes of jurisdiction, the "discrimination" mentioned by the Chief Justice is not between two branches of substantive Federal law, or substantive rights, but between two procedural types of remedial "*cases.*" The relevant clauses of the Constitution (Art. III, Sec. 2) and of the Judicial Code (28 U. S. C. Secs. 1331, 1333) in all instances specify "*cases.*"

But any subject matter is not a "*case*" until formally submitted to a Court. In *Osborne v. United States Bank*, 1824, 9 Wheat. (22 U. S.) 738, 819, Chief Justice Marshall clearly distinguished a person's enforceable "*rights*" from

a "case" by which he asserts such rights; saying, as respects "*Cases, in Law and Equity arising*" etc., that:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares, that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States." (22 U. S. 819). (Italics ours.)

Illustrating the point with the case at hand, the Court said:

"The suit of the *Bank of the United States v. Osborne and others*, is a case, and the question is, whether it arises under a law of the United States" (22 U. S. 819). (Italics ours.)

In *Cohens v. Virginia*, 1821, 6 Wheat. (19 U. S.) 264, 378, 404, Chief Justice Marshall said:

"This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." (Italics ours.)

In *Martin v. Hunter's Lessee*, 1816, 1 Wheat. (14 U. S.) 304, 338, Justice Story said:

"It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualifications as to the tribunal where

it depends. It is incumbent, then, upon those who assert such a qualification, to show its existence, by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." (*Italics ours.*)

Since, whatever be one's *rights*, he cannot have a "case" until it become so by formal suit (*Osborne v. United States Bank, supra*), nor be a "suitor" until he formally sues, the Constitution and statutory provisions concerning *jurisdiction* of a "case" and "saving to suitors" apply only when one as a "suitor" asserts his *rights* in a *form of suit* which constitutes it a "case"; i.e., either a "case of admiralty or maritime *jurisdiction*"; or, pursuant to the saving clause, a "case" of some one of the "*other remedies* to which they are otherwise entitled."

That it could not be otherwise is confirmed rather than refuted by Chief Justice Marshall's reasoning in *American Insurance Co. v. Canter, supra*, 1 Pet. (28 U. S.) 511, 545, that "the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two." For if the difference were between *rights* of persons rather than between processed "*cases*" of suitors, no statutory *right* could ever constitutionally be asserted in admiralty,* nor any maritime law *right* be constitutionally asserted at law, nor could a concurrent jurisdiction ever be constitutionally provided for.

They mean, rather that if one *sue* as by admiralty process and procedure, it must be in a Federal court of admiralty; and if one *sue* by process and procedure "at law" it must be in a State or Federal court of law.

* Such a theory, for example, would render unconstitutional the Suits in Admiralty Act, which, being a statute, is unquestionably a *law* of the United States, and still, by its terms, is inforceable only in admiralty. The same would be true of the Death on the High Seas Act.

The saving clause thus does not save from exclusive admiralty jurisdiction a proceeding *in rem*, which "is a proceeding in the nature and with the incidents of a *suit in admiralty*" (*The Moses Taylor*, 1866, 4 Wall. (71 U. S.) 411, 427); for by the Constitution such "are placed, from their commencement, exclusively under the cognizance of the Federal courts" (*Id.* p. 430). Such a remedy "is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an *admiralty proceeding in rem*" (*The Hine v. Trevor*, 1866, 4 Wall. (71 U. S.) 555, 571). See also *The Belfast*, 1868, 7 Wall. (74 U. S.) 624, 642, 643; *The Glide*, 1879, 167 U. S. 606, 615-619, 624.

But under the saving clause a suit *in personam* to enforce a right under the maritime law may be brought at law, either in a State court or on the law side of a Federal court having jurisdiction (*Leon v. Galceran*, 1870, 11 Wall. (78 U. S.) 185, 188-189; *Steamboat Company v. Chase*, 1872, 16 Wall. (83 U. S.) 522, 532-534; *Schoonmaker v. Gilmore*, 1880, 102 U. S. 118, 119; *Chappell v. Bradshaw*, 1888, 128 U. S. 132, 134; *Red Cross Line v. Atlantic Fruit Co.*, 1923, 264 U. S. 109, 123-124; *Panama R. R. Co. v. Vasquez*, 1925, 27 U. S. 557, 560-561) and "an action *in personam* to recover damages for tort is one of the most familiar of the common-law remedies" (*Panama R. R. Co. v. Vasquez*, *supra*, 271 U. S. at 561).

But in either form of suit, the substantive law and rights to be enforced are the same. As said in *Chelentis v. Luckenbach S. S. Co.*, 1918, 247 U. S. 372, 374:

"The distinction between *rights* and *remedies* is fundamental. A *right* is a well founded or acknowledged claim; a *remedy* is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a *right* sanctioned by the maritime law may be enforced through an appropriate *remedy* recognized at common

law; but . . . without regard to the court where he might ask relief, petitioner's *rights* were those recognized by the law of the sea." (Italics ours.)

The argument that exclusiveness operates differently and more completely against law jurisdiction in Federal courts than in State courts, or that the saving clause saves less to the law side of Federal courts than to State courts is contrary to all the foregoing cases. In *The Hine v. Trevar*, *supra*, 4 Wall. (71 U. S.) 555, at 569, the Court said that it is clearly established that:

"The original jurisdiction *in admiralty* exercised by the District Courts, by virtue of the act of 1789, is exclusive, not only of other Federal courts, *but of State courts also*" (Italics ours.)

Both *Leon v. Galceran*, *supra*, 11 Wall. (78 U. S.) 185 at 188, and *Steamboat Company v. Chase*, *supra*, 16 Wall. (83 U. S.) 522, at 533, with specific reference to this point, state that "*wherever*", i.e., in whatever court, State or Federal, the common law is competent to give a party a remedy, "the right to such a remedy is reserved and secured to *suitors* by the saving clause". The fact that they also contain mention of original diversity jurisdiction without mention of the original jurisdiction now conferred by 28 U. S. C. Sec. 1331, is due solely to the fact that they were decided in 1870 and 1872 before the Act of March 3, 1875, 18 Stat. c. 137, page 470, was enacted to give original jurisdiction of cases arising under the Constitution, laws or treaties of the United States.

It was in *Martin v. Hunter's Lessee*, *supra*, 1816, 1 Wheat. (14 U. S.) 304, that the Court first suggested that it might be imperative, and at least would be wise, for Congress to provide for original jurisdiction in the lower Federal courts of cases arising under the Constitution, laws or treaties of the United States, as comprehensive

as the "judicial power" extends thereto under the Constitution (1 Wheat. 336) and said:

"But even admitting that the language of the Constitution is not mandatory, and that Congress may Constitutionally omit to vest the judicial power in courts of the United States, *it cannot be denied, that when it is vested, it may be exercised to the utmost Constitutional extent*" (1 Wheat. 337). (Italics ours.)

The Court further said that:

"~~This~~ class of cases . . . affect, not only our internal policy, ~~but~~ our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety" (1 Wheat. 337).

See also:

The Moses Taylor, supra, 1866, 4 Wall. (71 U. S.) 411, 428-429.

In *The Mayor v. Cooper*, 1867, 6 Wall. (73 U. S.) 247, 252, the Court said:

"It is the duty of Congress to act for that purpose *up to the limits of the granted power*. . . . Jurisdiction, original or appellate *alike comprehensive in either case*, may be given. *The Constitutional boundary line of both is the same.*" (Italics ours.)

It was this view that Senator Carpenter expressed when he said in proposing the Act of March 3, 1875, that:

"This bill gives *precisely the power which the Constitution confers—nothing more, nothing less.*"

See Hart & Wechler, *The Federal Courts and the Federal System*, page 75 quoted from in petitioner's main brief, pages 21-25.

All three opinions in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 1955, 348 U. S. 310, 314, 323, 327, emphasize that the preponderant body of Federal maritime law is made by this Court and not by Congress.

Quin's brief (p. 14) argues that this construction will enable defendants to remove to the District Court under 28 U. S. C. Sec. 1441(b) actions initially commenced in State courts.

But, while no such question is involved here, the essential fairness of this also was pointed out by Justice Story in *Martin v. Hunter's Lessee*, *supra*:

"The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be *plaintiffs*, and would elect the national forum, but also for the protection of *defendants* who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the *plaintiff* may always elect the state court, the *defendant* may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as given equal rights. To obviate this difficulty, we are referred to the power which, it is admitted, Congress possesses to remove suits from state courts to the national courts; . . . Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together" (1 Wheat. 348-349, 350).

See also Justice Johnson's remarks at page 378.

Unless jurisdiction exist under 28 U. S. Sec. 1331, right of removal cannot exist under Sec. 1441(b), and *plaintiff parties only* would have a choice between Federal and

State court original jurisdiction; and this, notwithstanding that both sections use language comprehending "nothing less" than the Constitution uses in defining the judicial power, including this Court's power of review.

No right of removal, however, would exist unless the matter in controversy exceeded \$3,000 (28 U. S. C. Secs. 1331 and 1441(b)), and where the Jones Act is relied on, no right of removal would exist, since jurisdiction is expressly made covenant by the incorporated provisions of FELA (45 U. S. C. Sec. 56). The removability argument thus is both insubstantial and irrelevant.

Conclusion

In conclusion we say the Seamen's Act of March 4, 1915, was as to lifeboat equipment and Section 33 of the Jones Act a safety measure (see LaFollette, Vol. 1, p. 523, MacMillan, 1953). We urge this Court to adhere to the uniformity doctrine of the Maritime Law and enforce it against all persons and vessels within the jurisdiction of the Court, permitting any seaman to choose the American forum for the enforcement of his rights, so that foreign and American vessels, in the absence of treaty and legal restrictions to the contrary, shall operate under equal conditions.*

Respectfully submitted,

NARCISO PUENTE, JR.,
60 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.

Of Counsel:

SILAS B. AXTELL,

CHARLES ANDREWS ELLIS.

* While foreign seamen are free from arrest for desertion (see ratification 1929 Safety Treaty, Merchants Seamen's Law, Axtell, p. 145), they are subject to deportation on order of the Commissioner of Immigration.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~100~~ 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRANSATLANTICA, also known as SPANISH
LINE and GARCIA & DIAZ, INC., and QUIN LUMBER
CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT INTERNATIONAL
TERMINAL OPERATING CO. IN
OPPOSITION**

JOHN P. SMITH,
Attorney for Respondent,
International Terminal Operating Co.,
10 Rockefeller Plaza,
New York, New York.

Of Counsel:

JOHN NIELSEN.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No.

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRANS-
ATLANTICA, also known as SPANISH LINE AND GARCIA &
DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**BRIEF FOR RESPONDENT INTERNATIONAL
TERMINAL OPERATING CO. IN
OPPOSITION**

Opinions Below

The opinion of the District Court is reported in 142 F.
Supp. 570. The opinion of the Court of Appeals for the
Second Circuit has not yet been officially reported.

Question Presented

The only question raised upon appeal as against respondent International Terminal Operating Co. (hereinafter referred to as International) is whether, in an action brought on the civil side of the District Court, the District Court had jurisdiction of the action although there was no diversity of citizenship between plaintiff and all defendants.

Statement

Petitioner seeks to review the judgment of the Court of Appeals which affirmed the judgment of the District Court dismissing the complaint as to all respondents.

Plaintiff, a seaman aboard the S.S. Guadalupe, brought this action on the civil side against four defendants, alleging the following causes of action in his amended complaint:

1. Under the provisions of the Jones Act and the general maritime law against the defendants Compania Transatlantica (hereinafter referred to as Spanish Line) and Garcia & Diaz, Inc.
2. Under the general maritime law for maintenance and cure against Spanish Line and Garcia & Diaz.
3. In negligence against defendant International.
4. In negligence against defendant Quin Lumber Co. Inc. (hereinafter referred to as Quin).

Plaintiff was injured while performing his duties aboard the S.S. Guadalupe at Pier No. 2, Hoboken, New Jersey on or about May 12, 1954 (197a-206a).

It was stipulated by all parties that (1) plaintiff is a subject of Spain; (2) the Spanish Line is a Spanish corporation; (3) Garcia & Diaz is a New York corporation; (4) defendant International is a Delaware corporation.

(5) defendant Quin is a New York corporation; (6) the S.S. Guadalupe was owned by the Spanish Line; (7) the S.S. Guadalupe was registered under the Spanish flag; (8) the voyage of the S.S. Guadalupe started from Spain for various ports; (9) plaintiff was employed by the Spanish Line aboard the S.S. Guadalupe; (10) defendant Quin was an independent contractor hired by Garcia & Diaz to install cargo fittings aboard the S.S. Guadalupe; and (11) defendant International had a contract with Garcia & Diaz to load cargo (2a-4a, 10a-12a, 14a, 23a).

Testimony was taken on two issues: (1) management, operation and control of the S.S. Guadalupe on May 12, 1954, and (2) as to the contract under which the plaintiff was a crew member on the S.S. Guadalupe on May 12, 1954 (248a-251a).

The Court found that Garcia & Diaz did not have management, operation and control of the vessel (249a) and that plaintiff had certain rights against the Spanish Line by way of pension for life and for maintenance and cure (250a-251a).

On motion by each of the defendants for a dismissal of the complaint on the ground of lack of jurisdiction of the subject matter (194a) and upon the refusal of the plaintiff to amend his complaint and proceed upon diversity jurisdiction at law against the defendants Garcia & Diaz, International and Quin (189) or to proceed by libel in admiralty against said defendants (190a), the Court dismissed the complaint for the reasons stated in his opinion (251a-252a).

POINT I

The complaint was properly dismissed as against the defendant International Terminal Operating Co.

The jurisdiction of the District Court of the defendant International was predicated upon diversity of citizenship (28 U.S.C.A. 1332).

In order for a Federal Court to have jurisdiction for diversity of citizenship, all of the parties on one side must be diverse from all of the parties on the other side.

Treinies v. Sunshine Mining Co., 308 U. S. 66, 71;
Camp v. Gress, 250 U. S. 308, 312;
Strawbridge v. Curtis, 3 Cranch. 267.

Both plaintiff and defendant Spanish Line were Spanish citizens. Since the District Court dismissed plaintiff's action against the Spanish Line under the Jones Act upon the authority of *Gambera v. Bergoty*, 2 Cir., 132 F. 2d 414, cert. den. 319 U. S. 742 (251a, 252a) and the plaintiff elected to retain the Spanish Line as a party defendant with respect to the action under the general maritime law, the District Court had no jurisdiction as there was no diversity of citizenship.

In any event, since the plaintiff and defendant Spanish Line were aliens, and since the action was brought on the civil side of the court, the District Court properly held that it had no jurisdiction of the subject matter of this action even though some of the defendants were not aliens.

Cunard S. S. Co. v. Smith (C.C.A. 2), 255 Fed. 846, 848;

Ex Parte Edelstein (C.C.A. 2), 30 Fed. (2d) 636, 638;

Tsitsinakis v. Simpson, Spence & Young, (S.D.N.Y.), 90 Fed. Supp. 578.

POINT II

The petition and brief of petitioner present no issues which should be reviewed by this Court.

The judgments of the District Court and Court of Appeals for the Second Circuit are correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

**JOHN P. SMITH,
Attorney for Respondent,
International Terminal Operating Co.**

Of Counsel:

JOHN NIELSEN.

Office - Supreme Court, U.S.

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SUPREME COURT, U.S.
IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~881~~ **3**

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING Co., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN LUMBER Co., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS COMPANIA TRASAT-
LANTICA, ALSO KNOWN AS SPANISH LINE,
AND GARCIA & DIAZ, INC. IN OPPOSITION**

JOHN L. QUINLAN,
*Attorney for Respondents, Compania
Trasatlantica, also known as Spanish
Line, and Garcia & Diaz, Inc.,*

99 John Street,
New York City, New York.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

—against—

**INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR RESPONDENTS COMPANIA TRASAT-
LANTICA, ALSO KNOWN AS SPANISH LINE,
AND GARCIA & DIAZ, INC. IN OPPOSITION**

OPINIONS BELOW

The opinion of the District Court is reported in 142 F. Supp. 570 and is printed in the Appendix in Petitioner's Brief, pages 40 to 46.

The opinion of the Court of Appeals, Second Circuit, has not as yet been officially reported but is printed in the Appendix in Petitioner's Brief, pages 47 and 48.

STATEMENT OF THE CASE

The plaintiff is a Spanish citizen, domiciled and residing in Spain. At the time of this accident he was a seaman, member of the crew of the M/S "Guadalupe", having signed his shipping contract in Spain for a voyage out of and return to Spain. The vessel had left Spain and had stopped at (in the following order) Hoboken, Havana, Vera Cruz, Havana and Hoboken, when the accident occurred. Its next and final stop was back in Spain.

The answer of Compania Trasatlantica to the plaintiff's amended complaint sets forth four affirmative defenses, the First, Second and Fourth of which read:

"FIRST DEFENSE

18. This Court does not have jurisdiction of this or any suit between this plaintiff and it.

SECOND DEFENSE

19. This Court does not have jurisdiction of the subject matter of this action between this plaintiff and it.

* * * *

FOURTH DEFENSE

21. The plaintiff is a Spanish National and resident of Spain. The vessel on which he was injured is of Spanish registry and ownership. The agreement under which he sailed was signed

in Spain for a round-trip voyage from Spain. The plaintiff by agreement with this defendant agreed that all claims for injuries sustained while in the employ of this defendant were to be controlled, governed, adjudicated, dealt with and fall under the Laws of Spain and particularly the compensation Laws of Spain and were to be adjudicated in Spain or before a representative of the Spanish Government and by said laws and said agreement and by Treaty or Treaties between the United States and Spain. Plaintiff's sole rights are governed thereby and by his contract and plaintiff is limited in asserting those rights as aforestated; that this action cannot be maintained here; that this plaintiff cannot maintain suit against this defendant under the Jones Act or the General Maritime Law of the United States; that plaintiff's sole remedies against this defendant are as aforestated and must be asserted in Spain or before a representative of the Spanish Government."

The defendant Compania Trasatlantica, prior to the commencement of trial moved for a dismissal of the complaint on the grounds set forth in these defenses and each of the other defendants similarly moved.

As the determination of these motions necessitated the resolution of facts the court ordered a pre-trial hearing on the motions.

Despite (1) the admission by Compania Trasatlantica, in its answer that it owned, operated, managed and controlled the "Guadalupe" on May 12,

1954, the day this accident happened, and its denial that Garcia & Diaz, Inc. in any wise owned, operated, managed or controlled the vessel on that day and (2) the denial by Garcia & Diaz, Inc. in its answer that it owned or in any manner operated, managed or controlled the vessel, the plaintiff refused to stipulate as to ownership, operation, management and control of the vessel.

Accordingly, the Court ordered a pre-trial hearing on this question as well as on the questions of jurisdiction and Spanish Law.

At the conclusion of the pre-trial hearing the Court rendered its opinion holding that Garcia & Diaz, Inc. was no more than a "husbanding agent" for the "Guadalupe", "acting in every respect for its principal" Compania Trasatlantica.

As to plaintiff's employment by Compania Trasatlantica, as a seaman on the "Guadalupe", the Court found:

"Testimony was taken from experts in Spanish law upon which the court finds that under the codes, laws and regulations of Spain, where a seaman sails on a given voyage pursuant to a written contract and subsequently thereafter uninterruptedly, as in this case, remains in the employ of the ship during subsequent voyages, the subsequent service is under all the terms and conditions set forth in the original written contract.

The written contract provided, among other things, that the parties thereto submitted themselves to the provisions established by the Codes

of Laws regulating Commerce and Labor as also all other regulations in force.' It also provided '22) In the event of accident occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurance as determined by the Laws.'

The court also finds, on the basis of the testimony of the experts in Spanish Law, that plaintiff has a right, by virtue of his injury, to a pension for life of somewhere between 35% and 55% of his seaman's wages which, if the negligence of the ship owner is established, may be increased by one half. It is also found that under the pertinent Spanish Law, provision is made for plaintiff for the counterpart of maintenance and cure. It is also found that plaintiff's said rights may be asserted by demand upon the Spanish Consul in this city."

And the Court further found that this Spanish seaman who had signed Articles in Spain for a round trip from Spain and return thereto could not maintain a Jones Act cause of action against Compania Trasatlantica, his employer and owner and operator of the "Guadalupe"; that the suit presented no federal questions; and that the diversity between the parties, necessary to afford jurisdiction on the law side of the Court, was lacking. Further, the Court declined jurisdiction of the suit in admiralty as a matter of discretion, stating:

"In the light of the finding hereinabove that under Spanish Law the plaintiff may have compensation for his injury with an additional

amount if the defendant Compania is found to have been negligent, and that plaintiff is also accorded under Spanish Law the counterpart of maintenance and cure and that he may assert his claims to a Spanish Consul here, this court should and does decline jurisdiction even in admiralty as a matter of discretion."

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE PRE-TRIAL PROCEDURE WAS PROPERLY TAKEN BY THE DISTRICT COURT.

As to the objection of the plaintiff that the question of jurisdiction should not be inquired into preliminarily the District Court properly found that the question of the Court's jurisdiction could be inquired into at any stage of a proceeding.

To the plaintiff's contention that the question of jurisdiction was for the jury, the District Court correctly found:

"The Court: I think my concern has been very much dissipated by Professor Moore's comment in Paragraph 38.36 of his Volume V of his Second Edition. He says here categorically and sustains it by a footnote:

'Established doctrine and practice, however, dictate that there is no right of jury trial on the following issues—whether there is jurisdiction of the subject matter such as diversity.'

So that disposes of it, gentlemen. I am going to continue with this pretrial hearing."

As to the plaintiff's contention that the question of what is the law of Spain, was one for the jury, the Court correctly found:

"Then my original recollection as to this question of who decides foreign law was accurate:

Wigmore, in Section 2558 points out that:

"It was generally held at common law that a foreign law is a matter of "fact" i. e., its existence is to be determined by the jury. But the only sound view, either on principle or on policy, is that it should be proved to the judge who is decidedly the more appropriate person to determine it.' "

It then goes on to point out, after quoting from some cases:

'By the general trend of professional opinion and legislation, the common law doctrine is being abandoned and the terms of a foreign law become a question for the judge. This result is often nowadays reached by statutes authorizing judicial notice to be taken of foreign law.' "

Respecting inquiry into the question of operation and control of the "Guadalupe" by the defendant Garcia & Diaz, Inc., the District Court inquired of plaintiff's counsel whether he was prepared with

proof on that question and plaintiff's counsel stated he was:

"Mr. Puente: Your Honor, we will only stipulate as to ownership. Plaintiff will only stipulate as to ownership of the Guadalupe.

The Court: Who do you maintain operated and controlled it?

Mr. Puente: Because when the ship——

The Court: Please answer my question. Who do you maintain operated and controlled it?

Mr. Puente: Compania Trasatlantica and Garcia & Diaz.

The Court: Are you prepared with proof on that?

Mr. Puente: Yes, your Honor."

Plaintiff's counsel then introduced into the record all the proof he could ever produce on this question. As to it, the District Court correctly found:

"As to Management, Operation and Control of the S.S. Guadalupe on May 12, 1954.

The plaintiff's amended complaint alleges in Paragraph Fifth that defendant Compania operated, managed and controlled the vessel and in Paragraph Sixth that defendant Garcia operated, controlled and managed the vessel. On the basis of the deposition of defendant Garcia, through its treasurer, William Martinez, taken by plaintiff on June 10, 1954, and the contract between defendants Garcia and Compania, it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every respect for its principal, defendant Compania. It appears without contradiction that

neither Garcia nor any stockholder thereof owns any stock in Compania, nor is any director of Garcia a director of Compania, nor does Garcia exercise any control over Compania. It further appears that the relationship between Garcia and Compania originated in 1935 when a partnership, the predecessor of Garcia, commenced representing Compania in this port. That partnership was succeeded by the present corporate defendant, Garcia, and pursuant to a contract made in 1948 between Garcia and Compania, the former has since that time husbanded the latter's vessels in this port. It further appears that defendant Garcia represents as many as ten other Spanish and Cuban ship owners in this port, none of whom is a subsidiary of defendant Compania. It further appears that defendant Garcia did not contribute financially to the purchase or construction of the S.S. Guadalupe. As such agent, defendant Garcia pays the pilot and docking charges and the charges for water and supplies for the vessels of defendant Compania, but all for the account of the defendant Compania. For this service defendant Garcia receives from the defendant Compania commissions, based upon the incoming and outgoing freight and passenger traffic. There was no proof adduced at the pre-trial hearing of management, operation, and control by Garcia except as it might arise by virtue of the agency agreement. Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to his injury."

II. PLAINTIFF COULD NOT MAINTAIN THIS ACTION AGAINST DEFENDANT COMPANIA TRAS-ATLANTICA.

The claims asserted by plaintiff in the complaint against the defendant Compania Trasatlantica, are for

1. Maintenance and Cure.
2. Damages under the General Admiralty Law.
3. Damages under the Jones Act.

The first two claims, those for Maintenance and Cure and for damages under the General Admiralty Law, are based on and arise under the General Admiralty Law of the United States. They are common law rights and are not based on, nor do they arise out of or under, the Constitution, Laws, or Treaties of the United States. Accordingly, there had to be diversity of citizenship between plaintiff and defendant Compania Trasatlantica for the District Court to have jurisdiction of these claims. As plaintiff is a Spanish citizen and Compania Trasatlantica is a Spanish corporation, diversity did not exist between them.

Paduano v. Yamashita Kisen Kabushiki Kaisha, 2d Cir., 1955, 221 F. 2d 615;

Jordine v. Walling, 3d Cir., 1950, 185 F. 2d 662.

Accordingly, the Court did not have jurisdiction of these two claims asserted by this Spanish national against this Spanish corporation.

The third and only other claim asserted by this plaintiff against defendant Compania Trasatlantica, is under the Jones Act. The Court did have jurisdiction of a Jones Act cause of action despite lack of diversity as it arises under a law of the United States. However, this plaintiff cannot and does not have a right to bring action under the Jones Act. This is well established.

Gambera v. Bergoty, 2d Cir., 1942, 132 Fed. 2d 414, cert. denied, 319 U. S. 742:

"At the outset we pass it as irrelevant that the libellant is an enemy alien (Petition of Bernheimer, 3^d Cir., 130 F. 2d 396), and proceed to the merits. Section 33 of the Jones Act, §688, Title 46 U. S. C. A. does not use the word 'citizen'; it gives relief to 'seaman' eo nomine, leaving it to the courts to define the term more closely. We decided in *The Paula*, 2 Cir., 91 F. 2d 1001, that a German citizen who had signed the articles in Germany and shipped as a member of the crew of a German ship, could not avail himself of the act. He had chanced to suffer injury while she was in the harbor of New York, a port of call upon a voyage beginning and ending in Germany. The same ruling was made in *The Magdapur*, D. C., 3 F. Supp. 971, and by Judge Goddard in *Plamals v. S. S. Pinar del Rio*, 1925 Am. Mar. Cas. 1309, affirmed in 2 Cir., 16 F. 2d 984, and affirmed on other grounds in 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827. We regard *The Seirstad*, D. C., 27 F. 2d 982, and *Hogan v. Hamburg-American Line*, 152 Misc. 405, 272 N. Y. S. 690, as overruled by *Urvic v. F. Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312;

but we also regard it as settled law that alien seamen serving upon foreign ships owned by aliens, and bound upon a voyage which begins and ends outside the United States, cannot sue under the Jones Act for injuries suffered while the ship happens to be stopping at a port of call within our territorial waters" (P. 415).

Taylor v. Atlantic Maritime Co., 2d Cir., 1950, 179 Fed. 2d 597, cert. denied, 349 U. S. 915:

"* * * On the other hand, if the seaman is serving on a foreign ship, and if in addition he has signed articles in a foreign port, obviously there can be no recovery either in tort or in contract, even though, as in *The Paula*, supra, the injury happens on board ship in an American port" (P. 598).

III. THERE WAS NOT COMPLETE DIVERSITY BETWEEN PLAINTIFF AND ALL DEFENDANTS. THIS WAS A FATAL JURISDICTIONAL DEFECT.

Plaintiff is a Spanish National.

Defendant *Compania Trasatlantica*, is a Spanish corporation.

Defendant *Garcia & Diaz, Inc.* is a New York corporation.

Defendant *International Terminal Operating Co.* is a Delaware corporation.

Quin Lumber Co., Inc. is a New York corporation.

There was not, therefore, diversity between plaintiff and all defendants as the plaintiff and the defendant Compania Trasatlantica, both are of Spanish citizenship. There must be complete diversity between all plaintiffs and all defendants or a District Court cannot take jurisdiction of the action. This defect is fatal to jurisdiction here. An identical situation was presented in *Tsitsinakis v. Simpson, Spence & Young and N. C. and A. C. Hadjipateras*, D. C. N. Y., 1950, 90 Fed. Supp. 578. Plaintiff there was a Greek National. Simpson, Spence & Young is a domestic corporation. The other defendants were Greek Nationals. In deciding the District Court did not have jurisdiction to entertain the action, the Court said:

"The Court of Appeals for this Circuit has indicated that jurisdiction should not be declined where the plaintiff is entitled to the remedial benefits of the Jones Act. *Taylor v. Atlantic Maritime Co. et al.*, 2 Cir., 1950, 179 F. 2d 597, 598. Plaintiff does claim in this action under the Jones Act, but this is *a fortiori* impossible from the holding by the Court of Appeals that 'an alien, who signs articles in a foreign port for service on a foreign ship and is injured aboard ship in an American port, may not invoke the Jones Act; *The Paula*, [2 Cir.], 91 F. 2d 1001.' *Taylor v. Atlantic Maritime Co. et al.*, supra, 179 F. 2d at page 598; Cf. *O'Neill v. Cunard White Star*, 2 Cir., 1947, 160 F. 2d 446. Therefore the first cause of action based on the Jones Act must be dismissed.

The plaintiff has alleged two other causes of action, his second and third in the complaint, in which jurisdiction could be based only on Section 1332(a) (2) of Title 28 U. S. C. A. which gives

the district courts jurisdiction over actions where the matter in controversy exceeds the sum of \$3000 exclusive of interest and costs, and is between 'citizens of a State, and foreign states or citizens or subjects thereof.' It is well settled that in order to sustain jurisdiction of an action based on diversity of citizenship in the federal court, each plaintiff must be capable of suing each defendant in that court. See *City of Indianapolis v. Chase National Bank*, 1941, 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47. The courts of the United States have no jurisdiction of a case in which both parties are aliens, *Kavourgias v. Nicholaou Co.*, 9 Cir., 1945, 148 F. 2d 96, 97; if both a party plaintiff and a party defendant are aliens the District Court lacks jurisdiction, even though there are other parties in the action, as plaintiffs or defendants, who are citizens of the United States. *Compania Minera y Compradora de Metales Mexicano, S. A. v. American Metal Co.*, D. C. W. D. Tex. 1920, 262 F. 183; *Ex parte Edelstein*, 2 Cir., 1929, 30 F. 2d 636, certiorari denied, *Edelstein v. Goddard*, 1929, 279 U. S. 851, 49 S. Ct. 347, 73 L. Ed. 994. Since in this action the plaintiff and the two individual defendants (who, it seems, are indispensable to the action) are aliens, the Court has no jurisdiction to entertain the action" (P. 579).

Indianapolis et al. v. Chase National Bank, Trustee, et al., 1941, 314 U. S. 63, at page 69:

"* * * The specific question is this: Does an alignment of the parties in relation to their real interests in the 'Matter in controversy' satisfy the settled requirements of diversity jurisdiction?

As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an 'actual,' *Helm v. Zarecor*, 222 U. S. 32, 36, 'substantial,' *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss*, 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson v. Columbia Trust Co.*, 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' *Dawson v. Columbia Trust Co.*, supra, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' *East Tennessee, V. & G. R. v. Grayson*, 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court."

IV. PLAINTIFF HAD CONTRACTED THAT HIS RIGHTS WOULD BE GOVERNED BY SPANISH LAW.

In the contract of Employment entered into between plaintiff and defendant Compania Trasatlantica, it was agreed that in case of accident plaintiff's rights and remedies were to be governed by applicable Spanish Laws. The Contract provided:

"In the port of Bilbao, on the 9th of October, 1953, Mr. Eusebio Aguirre Gavina, native of Baracaldo, province of Biscay, with domicile at Portugalette, 46 years of age, Captain of the Spanish steamer 'Guardalupe', registered at Barcelona, by his own rights and in representation of the Ship-owners of said vessel, 'Compania Trasatlantica', with domicile at Barcelona, and Mr. Francisco Romero Onteirol, 32 years of age, native of Rebordelo, province of Corunna, by profession Deck Hand, whose identity was checked by the corresponding pass-book, agree to sign the present contract in compliance with the following conditions and both parties subject to the provisions established by the Codes of Laws regulating Commerce and Labor as also all other regulations in force.

* * * *

22) In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurances as determined by the Laws."

The District Court in its opinion found that these provisions were binding on plaintiff. And the District Court further found that this plaintiff had adequate remedy under the Spanish law which he had agreed would govern his rights against Compania Trasatlantica in the event of injury and that his rights could be asserted by demand upon the Spanish Consul in this City. The expert on Spanish law called by plaintiff and the expert on Spanish law called by defendant Compania Trasatlantica, agreed as to the latter. And Compania Trasatlantica tendered repatriation to plaintiff and made every effort to accomplish his repatriation to Spain where he could freely and easily assert his rights against Compania Trasatlantica. Justice did not, therefore, require the District Court to take any steps to secure these rights to plaintiff in this suit or to make any adjudications thereon in his favor.

Lauritzen v. Larsen, 345 U. S. 571:

"Inaccessibility of Foreign Forum.—It is argued, and particularly stressed by an *amicus* brief, that justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum. This might be a persuasive argument for exercising a discretionary jurisdiction to adjudge a controversy; but it is not persuasive as to the law by which it shall be judged. * * *

Confining ourselves to the case in hand, we do not find this seaman disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark. The Danish compensation system does not necessitate delayed, prolonged, expensive and uncertain litigation. It is

stipulated in this case that claims may be made through the Danish Consulate. There is not the slightest showing that to obtain any relief to which he is entitled under Danish law would require his presence in Denmark or necessitate his leaving New York. And, even if it were so, the record indicates that he was offered and declined free transportation to Denmark by petitioner" (pp. 589-590).

V. DETERMINATION OF WHETHER THE DISTRICT COURTS HAVE JURISDICTION IN MARITIME MATTERS WHERE NO DIVERSITY EXISTS IS UNNECESSARY TO A DETERMINATION OF THIS LITIGATION.

Even had the District Court retained jurisdiction and heard the case on the merits, the complaint, as against Compania Trasatlantica, would have been dismissed for (1) this plaintiff cannot maintain suit against Compania Trasatlantica under the Jones Act, and (2) this plaintiff having contracted with Compania Trasatlantica, that in the event of injury, his rights against it would be governed by Spanish Law, could not maintain action against it under the General Admiralty Law of the United States. The reasons therefor are set out under the preceding headings of this brief and are not repeated here.

Accordingly, the question raised by petitioner respecting jurisdiction of the District Courts in maritime matters, where no diversity exists, presents no reason for the granting of a writ. Decision of this question was and remains unnecessary to a determination of this litigation as this plaintiff had no right

in any event to maintain action against *Compania Trasatlantica* on the causes of action asserted in his complaint.

VI. A DISTRICT COURT NEED NOT GO THROUGH A COMPLETE TRIAL ON THE MERITS BEFORE DETERMINING WHETHER JURISDICTION EXISTS.

Petitioner urges that the decision of this Court in *Lauritzen v. Larsen*, 345 U. S. 571, required the District Court to go through a trial on the merits before deciding whether it had jurisdiction and whether plaintiff could maintain action against *Compania Trasatlantica*.

This Court actually said only:

“A cause of action under our law was asserted here, and the Court had power to determine whether it was or was not well founded in law and in fact.” (p. 575)

Petitioner endeavors to construe this language of the Supreme Court as intending to require a District Court to go through with a complete trial on the merits before deciding whether a cause of action can be maintained under the Jones Act or whether it has jurisdiction of the parties or of the controversy. This would mean that a District Court could never inquire into these questions on motion or until after full trial on the merits. The District Court is a Court of limited jurisdiction. It is, therefore, fundamental that it can and does inquire into its jurisdiction at any time by motion, at pre-trial, during trial or at any stage of a proceeding.

VII. THE SPANISH TREATY DID NOT CREATE ANY RIGHT IN THE PLAINTIFF TO MAINTAIN SUIT UNDER THE JONES ACT OR UNDER THE GENERAL MARITIME LAW OF THE UNITED STATES.

Article VI of the Spanish Treaty referred to by petitioner provides that Spanish subjects "shall have free access to the Courts" of the United States. No appellee here has argued that appellant is not free to bring a suit in an American court. The procedure of American courts is open to him without treaty. An alien has never been denied recourse to our courts.

But Article VI created no substantive right in appellant to maintain action under the Jones Act or under the General Admiralty Law of the United States. It provides only that he shall enjoy "in what concerns

1. arrest of persons
2. seizure of property
3. and domiciliary visits to their houses, manufactories, stores, warehouses, etc.

the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored nation".

No other rights under American law, either statutory or at common law, are conferred on appellant by Article VI. Certainly it cannot be argued that the language of Article VI conferred any right in him to maintain action in our courts under the Jones Act. And it can well be argued that the failure to confer

any additional rights to appellant, other than those specified, negated the existence of any other substantive American right in him or available to him.

Article XXIII of the treaty granted to the Spanish Consuls exclusive charge of the "internal order" of Spanish ships. It reserved to the Consuls and the Courts of Spain the resolution of differences between Captains, officers and crew. Disorders were to be dealt with exclusively by these bodies unless they threatened to cause a breach of peace. American authorities were to furnish aid to the Consuls in searching for, arresting, etc. crew members. Arrests were only to be made on the request of the Consuls, the Spanish authorities or the Courts of Spain. Release of persons arrested was to be made at the mere request of such authorities.

Article XXIII neither establishes nor cuts off any substantive American right to recover for injury. None are even mentioned or referred to in it. It seems senseless, therefore, for appellant to argue that its abrogation restored or created a substantive right in appellant under the General Admiralty Law or under the Jones Act to recover for injury.

Article XXIII did not reserve to the Spanish Consuls, jurisdiction over or settlement of the rights of Spanish seamen arising out of injury aboard Spanish vessels. Such rights are nowhere mentioned in the Article. It is impossible, therefore, for appellant to urge that the abrogation of this Article took away from the Consuls jurisdiction over such rights or that its abrogation created some right under American law in Spanish seamen to recover for injury.

The Court of Appeals correctly held that nothing in the text of Article XXIII conferred any substantive right on plaintiff. And the Court of Appeals also correctly held that nothing in the Article supported Petitioner's assertions respecting the jurisdictional questions involved. (Opinion of Court of Appeals, Petitioner's Appendix, pages 47 and 48).

In no event could the Treaty be construed to waive the jurisdictional requirements of our District Courts (Opinion of Court of Appeals, Appendix to Petitioner's Brief, page 48).

CONCLUSION

It is, therefore, respectfully submitted that the Petition should be denied.

Respectfully submitted,

JOHN L. QUINLAN,
*Attorney for Respondents Compania
 Trasatlantica, also known as Spanish
 Line, and Garcia & Diaz, Inc.,*

99 John Street,
 New York City, New York.

AUG 23 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRAS-
ATLANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

**BRIEF FOR RESPONDENT, QUIN LUMBER CO., INC.,
IN OPPOSITION**

SIDNEY A. SCHWARTZ

*Attorney for Respondent,**Quin Lumber Co., Inc.*

76 Beaver Street

New York 5, New York

WILLIAM J. KENNEY

Of Counsel

30 Church Street

New York 7, New York

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRAS-
ATLANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

**BRIEF FOR RESPONDENT, QUIN LUMBER CO., INC.,
IN OPPOSITION**

Opinions Below

The opinion of the District Court (App., p. 40 of Peti-
tion) is reported at 142 F. Supp. 570. The opinion of the
United States Court of Appeals for the Second Circuit
(App., p. 47 of Petition) is reported at 244 F. 2d 409.

Jurisdiction

The jurisdictional requisites are adequately set forth
in the Petition.

Question Presented

In the absence of complete diversity of citizenship between an alien seaman and each of the defendants does the District Court have jurisdiction on the civil side of claim for personal injuries sustained on a vessel in navigable waters by the mere sham allegation of the alien seaman that he invokes the benefits of the Jones Act, 46 U. S. C. A. §688, against his employer, an alien shipowner, one of several defendants in this action?

Statutes Involved

The statute which is basically involved is 28 U. S. C. §1332, set forth in the Appendix of Petition. For collateral consideration is 28 U. S. C. §1331 as projected by consideration of the Jones Act, 46 U. S. C. §688.

Statement

Since the affirmance by the Court of Appeals for the Second Circuit of the dismissal of petitioner's complaint because of the absence of diversity of citizenship, petitioner has instituted an action against all the respondents in the Supreme Court of the State of New York, New York County.

Petitioner thereafter filed his petition in this Court urging many points but obscuring the fundamental question, viz., did the District Court have jurisdiction of the subject matter of the action by reason of there not being complete diversity of citizenship between petitioner and each defendant.

It was stipulated upon the hearing to determine jurisdiction of the subject matter herein that the citizenship of the parties was as follows (p. 572 of 142 F. Supp.):

- (a) Plaintiff was a Spanish national.
- (b) Defendant, International Terminal Operating Co., hereinafter referred to as International, was a Delaware corporation.
- (c) Defendant, Spanish Line, was a Spanish corporation.
- (d) Defendant, Garcia & Diaz; hereinafter referred to as Garcia, was a New York corporation.
- (e) Defendant, Quin Lumber Co., Inc., hereinafter referred to as Quin, was a New York corporation.

Manifestly, we have a Spanish subject suing a Spanish subject and 3 citizens of states of the United States on the civil side of the federal Court.

It is the contention of Quin that, since both the petitioner and Spanish Line are aliens, the District Court lacked jurisdiction over the subject matter of the instant action and correctly so held. A determination of the soundness of such contention necessitates an analysis of the amended complaint.

In essence, this is an action brought by a foreign seaman to recover damages for personal injuries sustained while aboard the SS. Guadalupe on May 12, 1954 by reason of the alleged negligence of the defendants. Four causes of action are set forth in the amended complaint.

The first cause of action was asserted against the Spanish Line and Garcia under the Jones Act, 46 U. S. C. §688, and the General Maritime Law (200a).

The second cause of action was asserted against Spanish Line and Garcia under the General Maritime Law for maintenance and cure (201a).

The third cause of action was directed solely against the defendant International and consists of allegations to the effect that it was the negligence of International which caused injury to the plaintiff. It is to be noted that in paragraph "TWENTIETH" of the amended complaint it is alleged as follows (202a):

"The jurisdiction of this Court in regard to plaintiff's claim against the defendant INTERNATIONAL TERMINAL OPERATING Co. is predicated upon diversity of citizenship between the plaintiff and INTERNATIONAL TERMINAL OPERATING Co. and the amount in controversy is in excess of THREE THOUSAND (\$3,000) DOLLARS exclusive of interest and costs, and in addition, said injuries sustained by the plaintiff arose in navigable waters and therefore, said cause of action against the defendant INTERNATIONAL TERMINAL Co. is cognizable under the Constitution of the United States and the General Maritime Law of the United States."

The fourth cause of action set forth in the amended complaint, although purportedly asserted against Quin for its alleged negligence which caused the plaintiff's injuries, contains in paragraph "TWENTY-NINTH" allegations of negligence on the part of each of the defendants-appellees (204a) herein. In so far as the District Court's jurisdiction over the cause of action asserted against the defendant Quin is concerned, it is alleged in paragraph "TWENTY-EIGHTH" of the amended complaint as follows (204a):

"The jurisdiction of this Court in regard to plaintiff's claim against the defendant QUIN LUMBER Co., Inc., is predicated upon diversity of citizenship between the

plaintiff and QUIN LUMBER Co., INC., and the amount in controversy is in excess of THREE THOUSAND (\$3,000.00) DOLLARS exclusive of interest and costs, and in addition, said injuries sustained by the plaintiff arose in navigable waters, and theretofore, said cause of action against the defendant QUIN LUMBER Co., INC., is cognizable under the Constitution of the United States and the General Maritime Law of the United States."

It is thus clear that this action, considered as a whole, is one for damages for personal injuries allegedly caused by the negligence of each of the four defendants herein, notwithstanding the fact that the District Court's jurisdiction was invoked and bottomed on different bases respecting the various defendants.

Without allowing any proof as to the manner in which the accident occurred and therefor in no way determining whether there was negligence on the part of any of the respondents herein, which would then be a determination on the merits, the District Court correctly determined that it first had to find whether the allegation that the alien seaman, petitioner herein, was entitled to the benefits of the Jones Act, 46 U. S. C. §688, was a sham allegation—this, in order to dispose of one facet of the jurisdictional question. In order to determine whether the allegation by the petitioner was sham the District Court took proof as to the rights and obligations of the petitioner and his employer under the contract existing between the petitioner and his employer, the alien shipowner, and as to the operation of said vessel. The District Court found that the allegation that the petitioner was a seaman entitled to invoke the benefits of the Jones Act was a sham allegation and finding no basis for jurisdiction under the Jones Act and no other basis for retention of this matter on the civil

side of the Court the District Court gave the petitioner the choice to transfer the action to the admiralty side of the Court (188a-189a). Upon the petitioner refusing and upon the District Court's determination that it had no jurisdiction on the civil side it dismissed the complaint.

The Court of Appeals affirmed said dismissal on the District Court's "workmanlike opinion below which contains a full statement of the facts" (p. 410 of 244 F. 2d).

Argument

The issue in this case is a uniquely narrow one although petitioner's counsel has attempted to entwine with the narrow question one which has been decided against him on many occasions.¹ The single narrow question in this matter is whether an alien seaman can confer jurisdiction upon the District Court of his cause of action for personal injuries against multiple defendants by making the sham allegation that as against his employer, an alien shipowner, he is entitled to the benefits of the Jones Act, 46 U. S. C. §688.

If an alien seaman serving on a foreign flag ship with a contract of employment having been entered into in a foreign country, can merely by reason of having been injured in the navigable waters of the United States assert a Jones Act cause of action against his employer, an alien shipowner, then the flood gates are opened to the rush of cases that will be brought in the District Courts on the

¹ *The Paula*, 91 F. 2d 1001; *O'Neill v. Cunard White Star*, 160 F. 2d 446; *Taylor v. Atlantic Maritime Co.*, 179 F. 2d 597; *Catherall v. Cunard SS Co.*, 101 F. Supp. 230; *Rankin v. Atlantic Maritime Co.*, 117 F. Supp. 253; *Smith v. Furness Withy & Co.*, 119 F. Supp. 369; *Lauritzen v. Larsen*, 345 U. S. 571, 1953 A. M. C. 1210, 1211 (petitioner's counsel as amicus there); *Koziol v. The Fylgia*, 230 F. 2d 651.

civil side, triable by jury, where the only question which has been presented in *this* matter is the jurisdiction of the District Court on the law side where diversity of citizenship is the test and where said diversity is destroyed by the plaintiff being an alien and one of the defendants being an alien.

I.

The decision below is clearly correct; there is no conflict of decision and there is no important federal question.

After a searching examination of the authorities with respect to the issues involved in this matter the District Court in its opinion, characterized by the U. S. Court of Appeals for the Second Circuit as a "workmanlike opinion", found that it had no jurisdiction over the subject matter of this action.

It is fundamental learning that the jurisdiction of the District Court is limited solely to those types of actions over which jurisdiction has been specifically conferred by an Act of Congress. Such grants of jurisdiction are specifically set forth in sections 1331-1358 of Title 28 U. S. C. The only section (absent consideration of the Jones Act) pertinent to this action is 28 U. S. C. §1332.

It is provided in 28 U. S. C. section 1332 as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

- (1) Citizens of different States;
- (2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word 'States', as used in this section, includes the Territories and the District of Columbia."

By reason of the fact that the petitioner here is an alien and one of the respondents, Spanish Line, is also an alien, it is respectfully submitted that the District Court derived no jurisdiction over the instant action by reason of 28 U. S. C. 1332. The mere fact that *some* of the defendants are citizens of the United States and that actions brought solely against them would have been within the jurisdiction of the District Court is of no consequence, where all have been joined by plaintiff in one action. *Salem Co. v. Manufacturers Finance Co.*, 264 U. S. 182, 44 S. Ct. 266; *Camp v. Gress*, 250 U. S. 208, 39 S. Ct. 478; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 60 S. Ct. 44.

If the plaintiff and one of the defendants are aliens the District Court has no jurisdiction. *Compania Minera Y Compradora etc. v. American Metal Co.*, 262 F. 183; *Ex Parte Edelstein*, 30 F. 2d 636.

In the recent case of *Tsitsinakis v. Simpson, Spence & Yung, et al.*, 90 F. Supp. 578, we have an action almost identical to the instant one. There, an alien seaman sued several defendants, some of whom were aliens and some of whom were citizens. Judge Irving R. Kaufman in holding that the District Court did not have jurisdiction on the law side when a Jones Act suit had been alleged along with other causes of action said (p. 579):

"It is well settled that in order to sustain jurisdiction of an action based on diversity of citizenship in the federal court, *each plaintiff must be capable of suing each defendant in that court.* See *City of Indianapolis*

v. Chase National Bank, 1941, 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47. The courts of the United States have no jurisdiction of a case in which both parties are aliens, *Kavourgias v. Nicholaon Co.*, 9 Cir., 1945, 148 F. 2d 96, 97; *if both a party plaintiff and a party defendant are aliens the district court lacks jurisdiction, even though there are other parties in the action, as plaintiffs or defendants, who are citizens of the United States.* *Compania Minera y Compradora de Metales Mexicano, S.A. v. American Metal Co.*, D. C. W. D. Tex. 1920, 262 F. 183; *Ex parte Edelstein*, 2 Cir., 1929, 30 F. 2d 636, certiorari denied, *Edelstein v. Goddard*, 1929, 279 U. S. 851, 49 S. Ct. 347, 73 L. Ed. 994." (Italics supplied.)

It is submitted that the District Court on the civil side had no jurisdiction over the instant action since the plaintiff and one of the respondents, Spanish Line, are aliens.

There is no conflict of decision between Circuits with respect to the very narrow issue decided by the District Court and Court of Appeals. The attempt by the petitioner to peg jurisdiction over the subject matter of this action on a "federal question" theory, 28 U. S. C. 1331, is more apparent than real. The petitioner by the mere sham allegation that he is entitled to the benefits of the Jones Act has attempted to invest the District Court with jurisdiction over the entire matter insofar as all defendants-respondents are concerned. In circumstances such as exist in this matter it has been held that the Jones Act is not applicable. *Gambra v. Bergoty*, 132 F. 2d 414; *Taylor v. Atlantic Maritime Co.*, 179 F. 2d 597. Indeed, *Lauritzen v. Larsen*, 345 U. S. 571, cited by petitioner in support of his contention respecting the Jones Act, looks the other way in this respondent's view.

Not being entitled to the benefits of the Jones Act, there is no "federal question" issue in this matter. The District Court has not determined in this case liability on the merits under the Jones Act, which is the impression that one would obtain from petitioner's arguments. It has determined that petitioner cannot invoke the benefits of that statute for jurisdictional purposes in the District Court, a Court of limited jurisdiction, without in any way determining whether the proof, if it ever were adduced upon the trial, would show the respondents or any one of them to be negligent or the vessel to be unseaworthy.

Since this action did not arise under the laws of the United States (and it is to be anticipated that Spanish Line's brief in this matter will show that the rights of the alien seaman arise under and are circumscribed by a Spanish contract) the District Court had no jurisdiction on the law or civil side thereof in the absence of diversity of citizenship, *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615; *Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253; *Jordine v. Walling*, 185 F. 2d 662.

With there never having been a valid and substantial claim under the Jones Act or under any law of the United States there never was initial jurisdiction so that we could not have a case of pendent jurisdiction. Pendent jurisdiction presupposes a valid prior jurisdiction. *Howard v. Furst*, 238 F. 2d 790, 794. Whether we look at the amended complaint as really stating one cause of action against multiple defendants, although bottomed upon different bases, or as stating more than one cause of action, through any pleader's artistry, we have no pendent jurisdiction. *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586.

The petitioner's argument with respect to this matter having been a trial on the merits is a disservice to the Dis

trict Court since the Court at no time took any evidence respecting the conduct of the parties which would determine whether said conduct was negligent or not and whether the vessel was unseaworthy in any respect. The District Court confined itself to its jurisdiction to hear this matter on the law or civil side where the petitioner had not accepted the offer of the District Court to allow him to cull out of his amended complaint those defendants against whom diversity of citizenship existed and with the petitioner also refusing to transfer this matter to the admiralty side for trial on the merits.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied to which end this brief is

Respectfully submitted,

SIDNEY A. SCHWARTZ

Attorney for Respondent,
Quin Lumber Co., Inc.
76 Beaver Street
New York 5, New York

WILLIAM J. KENNEY

Of Counsel

30 Church Street

New York 7, New York

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FILED

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JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. ~~522~~ 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRANSATLANTICA, also known as SPANISH
LINE and GARCIA & DIAZ, INC., and QUIN LUMBER
CO., INC.,

Respondents.

**BRIEF FOR RESPONDENT INTERNATIONAL
TERMINAL OPERATING CO.**

JOHN P. SMITH,
Attorney for Respondent,
International Terminal Operating Co.,
10 Rockefeller Plaza,
New York, New York.

Of Counsel:
JOHN NIELSEN.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRANS-
ATLANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

**BRIEF FOR RESPONDENT INTERNATIONAL
TERMINAL OPERATING CO.**

Opinions Below

The opinion of the District Court is reported in 142 F. Supp. 570. The opinion of the Court of Appeals for the Second Circuit is officially reported in 244 Fed. (2d) 570.

Question Presented

The only question raised upon appeal as against respondent International Terminal Operating Co. (hereinafter referred to as International) is whether, in an action brought on the civil side of the District Court, the District Court had jurisdiction of the action although there was no diversity of citizenship between petitioner and all respondents.

Statement

Petitioner has been granted certiorari to review the judgment of the Court of Appeals which affirmed the judgment of the District Court dismissing the complaint as to all respondents.

Petitioner, a seaman aboard the S.S. Guadalupe, brought this action on the civil side against four respondents, alleging the following causes of action in his amended complaint:

1. Under the provisions of the Jones Act and the general maritime law against the respondents Compania Transatlantica (hereinafter referred to as Spanish Line) and Garcia & Diaz, Inc.
2. Under the general maritime law for maintenance and cure against Spanish Line and Garcia & Diaz.
3. In negligence against respondent International.
4. In negligence against respondent Quin Lumber Co., Inc. (hereinafter referred to as Quin).

Petitioner was injured while performing his duties aboard the S.S. Guadalupe at Pier No. 2, Hoboken, New Jersey, on or about May 12, 1954 (197a-206a).

It was stipulated by all parties that (1) petitioner is a subject of Spain; (2) the Spanish Line is a Spanish corporation; (3) Garcia & Diaz is a New York corporation;

(4) respondent International is a Delaware corporation; (5) respondent Quin is a New York corporation; (6) the S.S. Guadalupe was owned by the Spanish Line; (7) the S.S. Guadalupe was registered under the Spanish flag; (8) the voyage of the S.S. Guadalupe started from Spain for various ports; (9) petitioner was employed by the Spanish Line aboard the S.S. Guadalupe; (10) respondent Quin was an independent contractor hired by Garcia & Diaz to install cargo fittings aboard the S.S. Guadalupe; and (11) respondent International had a contract with Garcia & Diaz to load cargo (2a-4a, 10a-12a, 14a-23a).

Testimony was taken on two issues: (1) management, operation and control of the S.S. Guadalupe on May 12, 1954, and (2) as to the contract under which the petitioner was a crew member on the S.S. Guadalupe on May 12, 1954 (248a-251a).

The Court found that Garcia & Diaz did not have management, operation and control of the vessel (249a) and that petitioner had certain rights against the Spanish Line by way of pension for life and for maintenance and cure (250a-251a).

On motion by each of the respondents for a dismissal of the complaint on the ground of lack of jurisdiction of the subject matter (194a) and upon the refusal of the petitioner to amend his complaint and proceed upon diversity jurisdiction at law against the respondents Garcia & Diaz, International and Quin (189) or to proceed by libel in admiralty against said respondents (190a), the Court dismissed the complaint for the reasons stated in his opinion (251a-252a).

POINT I

The complaint was properly dismissed as against the respondent International Terminal Operating Co.

The jurisdiction of the District Court of the respondent International was predicated upon diversity of citizenship (28 U.S.C.A. 1332).

In order for a Federal Court to have jurisdiction for diversity of citizenship, all of the parties on one side must be diverse from all of the parties on the other side.

Treinies v. Sunshine Mining Co., 308 U. S. 66, 71;

Camp v. Gress, 250 U. S. 308, 312;

Strawbridge v. Curtis, 3 Cranch. 267.

Both petitioner and respondent Spanish Line were Spanish citizens. Since the District Court dismissed petitioner's action against the Spanish Line under the Jones Act upon the authority of *Gambra v. Bergoty*, 2 Cir., 132 F. 2d 414; cert. den. 319 U. S. 742 (251a, 252a) and the petitioner elected to retain the respondent Spanish Line as a party with respect to the action under the general maritime law, the District Court had no jurisdiction as there was no diversity of citizenship.

In any event, since the petitioner and respondent Spanish Line were aliens, and since the action was brought on the civil side of the court, the District Court properly held that it had no jurisdiction of the subject matter of this action even though some of the respondents were not aliens.

Cunard S. S. Co. v. Smith (C.C.A. 2) 255 Fed. 846, 848;

Ex Parte Edelstein (C.C.A. 2), 30 Fed. (2d) 636, 638;

Tsitsinakis v. Simpson, Spence & Young, (S.D.N.Y.), 90 Fed. Supp. 578.

The judgments of the District Court and Court of Appeals for the Second Circuit are correct.

CONCLUSION

The judgment dismissing the complaint as to respondent International Terminal Operating Co. should be affirmed.

Respectfully submitted,

JOHN P. SMITH,
Attorney for Respondent,
International Terminal Operating Co.

Of Counsel:
JOHN NIELSEN.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~32~~ 3

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,
Respondents.

**BRIEF OF RESPONDENT COMPANIA
TRASATLANTICA ON THE MERITS**

JOHN L. QUINLAN,
99 John Street,
New York 38, N. Y.,

*Attorney for Respondent Compania
Trasatlantica, also known as Span-
ish Line.*

Of Counsel:

JOHN M. AHERNE,
99 John Street,
New York 38, N. Y.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

—against—

**INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,**
Respondents.

**BRIEF OF RESPONDENT COMPANIA
TRASATLANTICA ON THE MERITS**

Statement of the Case

The petitioner is a Spanish subject (R. 2a). He was in the employ of the respondent Compania Trasatlantica, also known as Spanish Line, as a seaman and member of the crew of the "*Guadalupe*" at the time he was injured (R. 4a). Compania is a Spanish Corporation, incorporated under the laws of Spain (A. 27a, A. 33a) and is the owner of the "*Guadalupe*", (R. 5a). This vessel is registered under the laws of Spain and flies the flag of Spain (A. 27a, A. 34a).

References to the "appendix for appellant" are by the letter "R".

References to the appendix for appellee are by the letter "A".

The voyage on which petitioner was injured commenced in Spain. The "*Guadalupe*" left the port of Bilbao and after calling at several other Spanish ports sailed for North American ports calling in order at New York, Havana and Veracruz, then returning back through the ports of Havana and New York and back to its final port of discharge in Spain (R. 23a-R. 26a). While the vessel was enroute through the port of New York on its return voyage to Spain, petitioner was injured (R. 26a). At the time of the accident the vessel was actually docked at Pier 2, Hoboken (R. 198a).

The accident occurred May 12, 1954. Prior thereto and on October 9, 1953, petitioner signed on the "*Guadalupe*" under articles of agreement (R. 167a) providing, in their parts pertinent here, (Compania Trasatlantica's Ex. "A", R. 81a, A. 18a-23a);

"In the port of Bilbao, on the 9th. of October, 1953, Mr. Eusebio Aguirre Gavina, native of Baracaldo, province of Biscay, with domicile at Portugalette, 46 years of age, Captain of the Spanish steamer '*Guadalupe*', registered at Barcelona, by his own rights and in representation of the Ship-owners of said vessel, 'Compania Trasatlantica', with domicile at Barcelona, and Mr. Francisco Romero Onteirol, 32 years of age, native of Rebordele, province of Corunna, by profession Deck Hand, whose identity was checked by the corresponding pass-book, agree to sign the present contract in compliance with the following conditions and both parties subject to the provisions established by the Codes of Laws regu-

lating Commerce and Labor as also all other regulations in force. (A. 18a)

* * *

22) In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurances as determined by the Laws." (A. 22a).

Under Spanish law and regulations each seaman signs an individual contract or articles of agreement (R. 14a-R. 15a, A. 18a-A. 23a).

Petitioner thus expressly contracted that in the event of injury his rights against his employer, Compañia Trasatlantica, were to be those provided for in the Spanish Codes of Laws, and the other regulations in force.

Spain is exclusively a Code Country. Common law is non-existent in Spain and, accordingly, no General Admiralty Law exists there such as there is here in this country (R. 76a-77a, 136a). Petitioner was injured on the third round voyage of the "*Guadalupe*" following his signing of his Articles of Agreement on October 9, 1953. It was established by the expert on Spanish Law, called as a witness by respondent, that the conditions and provisions of the Articles of Agreement were binding on petitioner when he was injured (R. 46a-59a). It could not very well be denied as the law of Spain provides (R. 46a):

"The contracts, although limited for one trip, if the workman remains working he becomes a

steady worker, a permanent worker, and the clause referring to the time is converted into indefinite time, and so the contract is extended indefinitely."

Petitioner's rights under Spanish Law against his employer for injury are exclusively under the Spanish Workman's Compensation Law (R. 78a). Under the Workman's Compensation Law of Spain, petitioner will receive between 35 and 50 percent of his salary for life for the injury he sustained and if his employer is found to have been negligent, his compensation award can be increased 50 percent (R. 77a-R. 78a, R. 134a). In addition, the expenses of his hospitalization, treatment, cure and maintenance are paid (R. 71a-R. 72a, R. 124a, R. 139a).

Petitioner's rights being exclusively in compensation, he cannot maintain suit against his employer (R. 78a, R. 134a). Respondent Compania Trasatlantica, as required by Spanish Law, had insured its liability in compensation to petitioner as well as its liability for maintenance and cure (A. 27a, A. 34a). The fund for the payment of his compensation for life has long since been established (R. 77a). He was recovered sufficiently from his injury by July 10, 1954 to be repatriated to Spain and repatriation was tendered to him by respondent (Compania Trasatlantica Ex. "D", R. 111a; A. 24a-A. 25a, R. 91a). The bill of his attending physician was paid by respondent to that date (R. 185a, R. 186a). And the hospital at which he was treated was informed by respondent in writing that if it would render a bill to that date it would be paid by respondent (R. 91a, R. 113a-R. 115a, Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a).

The hospital at which petitioner was treated has never rendered a bill to respondent or its agent for treatment to July 10, 1954 although, as stated, it was advised by letter that if it did the bill would be paid by respondent (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a) and although advised again on the trial it would be paid by respondent (R. 91a, R. 113a). Important in point, in view of the contrary assertions in petitioner's brief, is the fact that the hospital at which petitioner was treated was also advised that in view of petitioner's ability to travel and be repatriated on July 10, 1954, respondent could not guarantee any of its bills beyond that date (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-25a). Respondent could not commit its insurer to charges here beyond that date for if it did it could not be reimbursed for those charges by its compensation insurer (R. 91a). Petitioner was tendered repatriation on a vessel of respondent carrying a competent and able ship's physician and would receive the best medical care and rehabilitation on his arrival in Spain under the direction of respondent's compensation insurer (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a).

Refusing to accept respondent's offer of repatriation petitioner continued in a hospital here incurring wholly unnecessary charges and refused to accept compensation under Spanish law, although fully aware that his employer would repatriate him to Spain where his compensation rights could be availed of and also although fully aware that his rights in Spanish Workman's Compensation could be administered by the Spanish Consul here in New York (R. 59a, R. 136a), if he desired to have them administered here.

Instead, petitioner instituted this suit against respondent just twelve days after his injury occurred or on May 24, 1954, (R. A., Docket entries).

Additional respondents named in the suit are:

International Terminal Operating Co., a Delaware corporation;

Garcia & Diaz, Inc., a New York corporation;

Quin Lumber Co., Inc., a New York corporation.
(R. 2a-R. 4a)

The suit by petitioner, in so far as it was brought against this respondent was brought to recover:

1. Maintenance and cure and wages to the end of the voyage;
2. Damages under the General Admiralty Law, and
3. Damages under the Jones Act.
(T. 46 U. S. C. A., sec. 688).
(Amended Complaint, R. 196a-R. 206a).

Respondent, by way of affirmative defense in its answer to petitioner's Amended Complaint, pleaded (R. 214a-R. 215a):

"FIRST DEFENSE

18. This Court does not have jurisdiction of this or any suit between this plaintiff and it.

SECOND DEFENSE

19. This Court does not have jurisdiction of the subject matter of this action between this plaintiff and it.

* * *

FOURTH DEFENSE

21. The plaintiff is a Spanish National and resident of Spain. The vessel on which he was injured is of Spanish registry and ownership. The agreement under which he sailed was signed in Spain for a round-trip voyage from Spain. The plaintiff by agreement with this defendant agreed that all claims for injuries sustained while in the employ of this defendant were to be controlled, governed, adjudicated, dealt with and fall under the Laws of Spain and particularly the compensation Laws of Spain and were to be adjudicated in Spain or before a representative of the Spanish Government and by said laws and said agreement and by Treaty or Treaties between between the United States and Spain. Plaintiff's sole rights are governed thereby and by his contract and plaintiff is limited in asserting those rights as aforestated; that this action cannot be maintained here; that this plaintiff cannot maintain suit against this defendant under the Jones Act or the General Maritime Law of the United States; that plaintiff's sole remedies against this defendant are as aforestated and must be asserted in Spain or before a representative of the Spanish Government."

Prior to this suit being assigned for trial, respondent moved, on the basis of these defenses, to dismiss the suit as against it.

The District Court set this motion for a preliminary hearing (R. 2a, R. 7a-R. 9a, R. 29a, R. 87a-R. 88a, R. 101a, R. 194a).

Although petitioner now suggests objection was made to such preliminary hearing, his counsel of record stated at the commencement thereof (R. 18a):

"The Court: I don't understand the basis of your objection. Are you objecting to my proceeding with the pretrial hearing?"

Mr. Puente: No. My objection is to the manner in which it is going, although your Honor is being very fair. * * *"

Questions Presented

The principal question presented by Compania Trasatlantica in the Courts below was whether petitioner could maintain this action for damages against it under the Jones Act and under the General Admiralty Law of the United States and that is the question with which this respondent is principally concerned on this appeal to this Court. If the holdings of the lower courts on this question are affirmed by this Court, then the matter as to this respondent is at an end.

Should this Court determine that although petitioner cannot maintain suit under the Jones Act he can maintain suit against this respondent under the General Admiralty Law of the United States then the question of whether such action can still be maintained on the Civil or Law side of the court in the absence of complete diversity between petitioner and all the respondents is presented. Further questions presented by this respondent are:

Whether this petitioner can in any event be permitted to maintain suit against this respondent where

to permit him to do so subjects this respondent to a double responsibility and possibly a double liability for a single injury.

Whether a full trial on the merits was a prerequisite to a consideration by the District Court of the defenses of "lack of jurisdiction of the subject matter" and "failure to state a claim upon which relief can be granted".

Whether the questions of Spanish law were questions of fact for a jury or questions to be decided by the Court alone.

Whether the abrogation of articles VI and XXIII of the Spanish Treaty created any right in the petitioner to maintain suit against this respondent under the Jones Act or under the General Admiralty Law of the United States.

Whether the District Court properly declined discretionary jurisdiction in admiralty.

Summary of Argument

The argument presented by respondent Compania Trasatlantica in this brief can be summarized as follows:

Respondent argues that this Spanish seaman, sailing on a Spanish flag vessel, and under Spanish articles of agreement signed in Spain and providing that in the event of injury his rights against the vessel owner are to be governed by Spanish Law cannot maintain suit against it under the Jones Act (Section 688 of Title 46 U. S. C.) or under the General

Admiralty Law of the United States. This Court in *Lauritzen v. Larsen*, 345 U. S. 571, decided May 25, 1953, determined that a foreign seaman on a foreign flag vessel under foreign articles of agreement providing that his rights against the vessel owner were to be governed by Danish law, could not maintain suit against his employer under the Jones Act, and this despite the fact that the seaman signed the articles in a United States port. The *Lauritzen* case differs from the present case only in that:

1. The seaman in the *Lauritzen* case was injured in a foreign port whereas the petitioner here was injured in a United States port;
2. The seaman in the *Lauritzen* case brought suit only under the Jones Act whereas petitioner here has brought suit under both the Jones Act and the General Admiralty Law of the United States.

It is the position of respondent Compania Transatlantica that the provision of petitioner's articles of agreement or contract with it, that in the event of injury, his rights against it should be governed by Spanish Law, should be honored and enforced by the courts of this country even though his injury occurred in a United States port; that in any event the Jones Act was never intended by title or by wording to apply to claims or suits by foreign seamen on foreign vessels under foreign articles even though the seaman sustained injury in a United States port; that to permit petitioner to maintain this suit either under the Jones Act or under the General Admiralty Law of the United States will "bring us in conflict with the maritime world" (*Lauritzen* case, *supra*),

and would require a complete disregard of the contract or articles of agreement entered into between petitioner and respondent; that the enforcement of petitioner's contract or articles of agreement in no way violates the public policy of the United States, and their enforcement is in accord with the settled American doctrine that matters of discipline and things occurring on board a foreign flag vessel which do not involve violation of the peace or dignity of our country or the tranquility of our ports should be left to be dealt with by the laws of the nation of the vessel's flag.

Subsidiary to but allied with the foregoing is the fact that to allow petitioner to maintain this action subjects respondent to a double responsibility and possibly a double liability for a single injury. The Spanish law provides full compensation to petitioner for his injury and a life pension has been established under Spanish law for him and awaits only his asking in Spain or at the Spanish Consulate in New York. This life pension cannot be denied him. Should he be permitted to maintain this action in our courts under our law and should he effect recovery in this action he will have effected a double recovery for a single injury and imposed a double liability for that single injury on this respondent.

Dealt with further in the argument in this brief is the right of the District Court to inquire preliminarily and before a trial on the merits into the right of this petitioner to maintain suit under the Jones Act or the General Admiralty Law of the United States. Petitioner questions the right of the District Court to conduct this inquiry or hearing. This re-

spondent asserts that by the wording of Rule 12 of the Federal Rules of Civil Procedure such inquiry is fully authorized. Petitioner also asserts that the question of Spanish Law which arose on the preliminary hearing was a question for the jury. Respondent argues herein that such a question is one for the Court and submits that this is fully substantiated by authoritative decisions.

Somewhat vaguely petitioner argues that the abrogation of Article VI and of Article XXIII of the Treaty between the United States and Spain created in or restored in petitioner a right to maintain suit against respondent under the Jones Act and under the General Admiralty Law of the United States. It is respondent's argument that neither of these Articles of the Treaty either created nor cut off any such rights in petitioner and their abrogation, accordingly, neither restored nor created any such right in him.

At the conclusion of the preliminary hearing, the District Court declined discretionary jurisdiction in admiralty. This was because it had been clearly shown that petitioner had been awarded complete compensation for his injury under Spanish Law. The action of the District Court in this regard is fully substantiated by the authorities and particularly by the decision of this Court in *Canada Malting Co. Ltd. v. Paterson Steamship Co., Ltd.*, 285 U. S. 413.

ARGUMENT

POINT I

The decision of this Court in *Lauritzen v. Larsen*, 345 U. S. 571, is decisive of the question of petitioner's right to maintain this suit against respondent *Compania* and required a dismissal of the complaint as against it.

In *Lauritzen v. Larsen*, 345 U. S. 571, decided May 25, 1953, this Court had before it the suit of a foreign seaman on a foreign flag vessel under foreign articles of agreement (but signed in the United States) providing that his rights against his vessel owner employer were to be governed by Danish Law. This Court in concluding that his articles of agreement were binding on him, and that he could not maintain suit under the laws of the United States, stated (pp. 584-586):

"2. Law of the Flag.—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose the character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. *United States v. Flores*, 289 U. S. 137, 155-159, and cases cited. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in *United States v. Flores*, *supra*, at 158, and iterated in *Cunard Steamship Co. v. Mellon*, *supra*, at 123:

'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws

of that nation or the interests of its commerce should require’

This was but a repetition of settled American doctrine.

These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears.”

These conclusions are even more applicable in the present litigation for here petitioner’s Articles of Agreement were entered into in Spain and were for a round trip voyage from Spain and return thereto. They likewise provided specifically that petitioner’s claims for injury were to be governed by Spanish Law (A. 22a):

“22) In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurances as determined by the Laws.”

The “Laws” referred to in the foregoing provision of petitioner’s Articles of Agreement are the “Codes of Laws Regulating Commerce and Labor as also all regulations in force” referred to in the first paragraph of the Articles of Agreement (A. 18a).

No “heavy counterweight” appears weighing against holding petitioner bound by his Article of Agreement in which he agreed that in the event of injury his rights against respondent would be governed by applicable Spanish Law. And, there is

nothing in the public policy of the United States mitigating in the least against the enforcement of these provisions of petitioner's Articles of Agreement. What was said by this Court in the *Lauritzen* case, *supra*, on this point is as applicable in the present case as it was there (pp. 588-589):

"But if contract law is nonetheless to be considered, we face the fact that this contract was explicit that the Danish law and the contract with the Danish union were to control. Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high-seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. *The Belgenland*, 114 U. S. 355, 367; *The Hanna Nielsen*, 273 F. 171".

The history of the Jones Act was reviewed at great length in the *Lauritzen* case, *supra*. This Court there recognized that the Act was passed by Congress in 1920 under the title "An Act to Provide For the Promotion and Maintenance of the American Merchant Marine * * *" (p. 580) and that it merely amended the La Follette Act, passed by Congress in 1915 and entitled "An Act to Promote the Welfare of American Seamen in the Merchant Marine in the United States * * *" (p. 579). This Court further

recognized that it was never, either by title or its wording, intended to apply to foreign seamen on foreign vessels and that there was no justification for interpreting it to intervene between foreigners and their own law (p. 593) and that to apply the Jones Act in such a situation "would bring us in conflict with the maritime world" (p. 592). The Act was passed to promote the "American Merchant Marine" and to promote the "Welfare of American seamen" and was never intended to apply to foreign seamen on foreign ships.

There can be no justification for interpreting the Jones Act to intervene between this foreign seaman and foreign vessel owner simply because the occurrence involved took place in an American port. To do so or to apply the General Maritime Law of the United States here would as equally and effectively "bring us in conflict with the maritime world". To do so would involve and require a complete disregard of the provision of the Articles of Agreement between petitioner and respondent wherein it is provided that in the event of injury to petitioner his rights against respondent are to be governed by Spanish Law.

In the *Lauritzen* case, supra, the fact that Articles of Agreement were signed in New York was found to be completely offset "by provisions of his contract that the law of Denmark should govern" (p. 592). Here the fact that the accident occurred in a United States port is likewise completely offset by the provisions of petitioner's contract that the law of Spain should govern (A. 22a).

No inconvenience, hardship or injustice can result to petitioner by the enforcement of his contract. He

is entitled under Spanish Law to between 35% and 50% of his salary for life and if his employer is found to have been negligent his compensation award can be increased 50% (R. 77a-R. 78a, R. 134a). The fund for the payment of his compensation award has long been established (R. 77a). The expenses of his hospitalization, treatment, cure and maintenance are required to be paid by Spanish Law (R. 71a-R. 72a, R. 124a, R. 139a). When he was fit for repatriation to Spain, repatriation was offered him by respondent (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a, R. 91a). It was refused by him. But his rights under Spanish Law can be asserted here before the Spanish Consul (R. 59a, R. 136a). He has failed and refused to avail himself either of repatriation to Spain where he might assert his rights under Spanish Law or to present himself to the Spanish Consul here in New York and have his rights administered. Instead he instituted this suit against respondent twelve days after his accident (R. A. Docket entries). The hospital at which he was treated was advised that its bill to the date when petitioner was fit for repatriation would be paid if presented. The hospital has to this time failed to bill respondent to that date (Compania Trasatlantica Ex. "D", R. 111a, A. 24a-A. 25a, R. 91a, R. 113a).

In point in this connection is the language of this Court in the *Lauritzen* case, *supra* (p. 590):

"Confining ourselves to the case in hand, we do not find his seaman disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark. The Danish compensation system does not necessitate delayed.

prolonged, expensive and uncertain litigation. It is stipulated in this case that claims may be made through the Danish Consulate. There is not the slightest showing that to obtain any relief to which he is entitled under Danish law would require his presence in Denmark or necessitate his leaving New York. And, even if it were so, the record indicates that he was offered and declined free transportation to Denmark by petitioner."

The injury to petitioner concerns only petitioner and respondent and the internal economy of the vessel. Enforcement of petitioner's Articles of Agreement will not, therefore, involve violation of the peace or dignity of this country, the tranquility of our ports, or our public policy. Settled American doctrine, accordingly, requires that the rights and responsibilities of petitioner and respondent be governed by the law of Spain. This Court recognized the necessity of this rule in the *Lauritzen* case, *supra*, saying there (pp. 585-586):

"It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in *United States v. Flores*, *supra*, at 158, and iterated in *Cunard Steamship Co. v. Mellon*, *supra*, at 123:

"And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of

the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require'

This was, but a repetition of settled American doctrine.

These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears."

The question of the rights of a foreign seaman on a foreign flag vessel, under foreign articles, to bring suit under the laws of the United States for injury sustained in a United States port has often been considered. Without exception the holdings have been that such a suit cannot be maintained.

Gambera v. Bergoty, 132 Fed. 2d 414, Second Circuit, 1942, cert. denied, 319 U. S. 742:

"At the outset we pass it as irrelevant that the libellant is an enemy alien (*Petition of Bernheimer*, 3 Cir., 130 F. 2d 396), and proceed to the merits. Section 33 of the Jones Act, §688, Title 46 U. S. C. A. does not use the word 'citizen'; it gives relief to 'seaman' eo nomine, leaving it to the courts to define the term more closely. We decided in *The Paula*, 2 Cir., 91 F. 2d 1001, that a German citizen who had signed the articles in Germany and shipped as a member of the crew of a German ship, could not avail himself of the act. He had chanced to suffer injury while she

was in the harbor of New York, a port of call upon a voyage beginning and ending in Germany. The same ruling was made in *The Magdapur*, D. C., 3 F. Supp. 971, and by Judge Goddard in *Plamals v. S. S. Pinar del Rio*, 1925 Am. Mar. Cas. 1309, affirmed in 2 Cir., 16 F. 2d 984, and affirmed on other grounds in 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827. We regard *The Seirstad*, D. C., 27 F. 2d 982, and *Hogan v. Hamburg-American Line*, 152 Misc. 405, 272 N. Y. S. 690, as overruled by *Urvic v. F. Jarka Co.*, 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312; but we also regard it as settled law that alien seamen serving upon foreign ships owned by aliens, and bound upon a voyage which begins and ends outside the United States, cannot sue under the Jones Act for injuries suffered while the ship happens to be stopping at a port of call within our territorial waters" (p. 415).

The Paula, 91 F. (2d) 1001, Second Circuit, 1937:

"The libelant claims not only under the maritime law but also under section 33 of the Jones Act (46 U. S. C. A. §688). He asks us to rule that this applies to an alien seaman on a foreign ship who signed on at a foreign port, if he sustains injury in a port of the United States through the negligence of a fellow seaman. This question was expressly left open in *Plamals v. Pinar Del Rio*, 277 U. S. 151, 155, 48 S. Ct. 457, 72 L. Ed. 827. Precise authority on it is meager. Such as there is has answered the question in the negative" (p. 1003).

The Ivaran, 35 Fed. Supp. 229, S. D., N. Y., 1940:

"The facts briefly are as follows: Libelant is a citizen of Norway; he signed articles of employment for the ship *Ivaran* in Norway; he was sent to this country to join the ship sometime during the latter part of 1939. He became a member of the crew at New York City in December, 1939, and a short time thereafter, while the vessel was at Baltimore, he was injured. In the ship's articles, signed by libellant, he agreed that his employment on the vessel should be governed by the terms of the Norwegian law.

Under the law of Norway, a seaman is entitled to recover for his injury, compensation from the Royal Insurance Fund, which is in the nature of compensation insurance and which is exclusive. The pertinent section of the Norwegian law which is applicable is as follows: 'Shipowners, Masters and others who command on board incur no liability, either personally or with the value of the ship and freight, for accidents which come within the cognizance of the present Law, except when it is proved by a criminal sentence that the injury was caused purposely or by gross inadvertency.' (§28, Section 1, Laws of June 24, 1931 of the Kingdom of Norway)" (p. 230).

The Court of Appeals, Second Circuit, in affirming the dismissal of the libel in that case, said (121 Fed. 2d 445, at page 446):

"PER CURIAM.

Dismissal of the libel is affirmed on the authority of *The Paula*, 2 Cir. 81 F. 2d 1001, certiorari denied. *Peters v. Lauritzen*, 302 U. S. 750, 58 S.

Ct. 270, 83 L. Ed. 580. Affirmance, however, is without prejudice to renewal of the suit in the event that the remedy available to the seaman by presentation of his claim to the Norwegian Consulate in New York should prove to be non-existent."

In *Taylor v. Atlantic Maritime Co.*, 179 Fed. 2d 597, cert. denied, 349 U. S. 915, 1950, the Court of Appeals, Second Circuit, stated:

"* * * On the other hand, if the seaman is serving on a foreign ship, and if in addition he has signed articles in a foreign port, obviously there can be no recovery either in tort or in contract, even though, as in *The Paula*, supra, the injury happens on board ship in an American port" (p. 598).

In 1951 Judge Irving R. Kaufman in *Catherall v. Cunard S. S. Co.*, 101 Fed. Supp. 230, S. D., N. Y., said:

"The objection to the court's jurisdiction of the Jones Act cause of action is well taken. Plaintiff is a foreign national who signed aboard a foreign ship in a foreign country, for a voyage beginning and ending in a foreign port. Even if the injury occurs in United States waters, under these circumstances plaintiff is allowed no recovery. The Court of Appeals for this Circuit has repeatedly affirmed this holding. *The Paula*, 2 Cir. 1937, 91 F. 2d 1001; *O'Neill v. Cunard White Star Ltd.*, 2 Cir., 1947, 160 F. 2d 446; *Taylor v. Atlantic Maritime Co.*, 2 Cir. 1950, 179 F. 2d 597. Those cases in which a foreign

seaman *has* been allowed access to the Jones Act are not in point. *Gambera v. Bergoty*, 2 Cir. 1942, 132 F. 2d 414, concerned a long-time resident alien of the United States serving on a ship in the United States intercoastal traffic. *Kyriakos v. Goulandris*, 2 Cir. 1945, 151 F. 2d 132, was the case of a seaman who signed aboard a foreign vessel, in the United States, for a voyage beginning and ending in the United States" (p. 232).

See also:

Nakken v. Fearnley & Eger, 137 F. Supp. 288, (S. D., N. Y., 1955);

Smith v. Furness, Withy & Co., 119 F. Supp. 369, (S. D., N. Y., 1953);

Rankin v. Atlantic Maritime Co., 117 F. Supp. 253, (S. D., N. Y., 1953).

POINT II

To allow petitioner to maintain this action against respondent would subject it to a double responsibility and possibly a double liability for a single injury.

Respondent's responsibility to petitioner has long since been fixed and determined. The fund for the payment of a life pension to him has been established (R. 77a) under Spanish Law. The expert on Spanish Law called by respondent on the hearing is the attorney for the Instituto Nacional where petitioner's life pension has been established. He examined petitioner's file before leaving for this country to testify at this trial, and testified to these facts (R. 77a). Petitioner's life pension awaits merely his asking in

Spain or at the Spanish Consulate in New York (R. 59a, R. 136a). It cannot be denied him. Petitioner does not have an election under Spanish Law to either take compensation or bring suit against respondent. His sole right against respondent is in compensation (R. 78a, R. 134a). To allow him to maintain this action against respondent subjects respondent to a double responsibility and possibly to a double liability for a single injury.

POINT III

A full trial on the merits was not a pre-requisite to a consideration of respondent's motion.

Petitioner contends in Point III of his brief (p. 40) that the mere statement in his complaint of causes of action under the Jones Act and the General Admiralty Law of the United States required a full trial by jury on the merits before consideration could be given to his right to bring suit on these causes of action.

This contention is shortly disposed of by the provisions of Sub-divisions (b) and (d) of Rule 12 of the Federal Rules of Civil Procedure which provide:

“(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading hereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of juris-

diction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defenses in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Respondent Compania Trasatlantica pleaded the defenses of "lack of jurisdiction over the subject matter" and "failure to state a claim upon which relief can be granted" in its answer (R. 214a-R. 215a).

Respondent having then made "application" for a hearing on these defenses the Court, as authorized by the provisions of subdivision (d), "heard and determined" these "defenses", "before trial".

POINT IV

The questions of Spanish Law were not jury questions but were questions of law for the Court.

A full trial of the applicable Spanish Law was had, respondent producing and placing this law in evidence and producing an expert on Spanish Law (R. 43a-R. 79a) and petitioner's counsel placing in evidence such Spanish Law as he contended applicable and also producing an expert on Spanish Law (R. 118a-R. 164a). The questions of Spanish Law presented on the hearing were not jury questions but were questions of law for the Court. This is clearly established by the following authorities:

Liechti v. Roche, 198 F. 2d 174 (Fifth Circuit, 1952):

"Several applicable principles of law are too well settled to admit of serious dispute. The court is called upon to enforce a cause of action that has arisen under and been created by the law of the Republic of Panama, *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, 478, 32 S. Ct. 132, 56 L. Ed. 274. The measure of damages, as well as

the right to recover, is governed by the *lex loci delictus* *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 547, 34 S. Ct. 955, 58 L. Ed. 1457; *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900. Neither the District Court nor this Court takes judicial notice of the laws of the Republic of Panama but such foreign laws must be pleaded and proved as facts, *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, 479, 32 S. Ct. 132, 56 L. Ed. 274; *Mexican Central Railway Co., Ltd. v. Chantry*, 5 Cir., 136 F. 316, 322.

There is considerable controversy whether the proof of foreign law should be addressed to and the state of the foreign law determined by the court or by the jury, 53 Am. Jur., Trial, Sec. 241. The cases on the subject are collected in annotations in 34 A. L. R. 1447 and 68 A. L. R. 809. Professor Wigmore states that, " * * the only sound view, either on principle or on policy, is that it (foreign law) should be proved to the judge, who is decidedly the more appropriate person to determine it". 9 Wigmore on Evidence (3d ed.) Sec. 2558. In a footnote to that text Professor Wigmore continues: 'The decisions seldom lay down either rule absolutely, owing in part to the desire to retain the principle of the Court's construction of documents * * * while recognizing the jury's function of crediting the evidence; but there is no necessity here for conceding anything to the latter; * * *. (p. 176)

* * *

We conclude that it was the judge's function to determine the state of the foreign law, and hence that the District Court did not err in de-

clining to submit to the jury the issue of whether compensation for pain and suffering was recoverable as damages under Panamanian law, and did not err in refusing the defendant's proffered instructions 3, 4, 5 and 6." (p. 177).

See also:

Bonsalem v. Byron S. S. Co., Limited, 50 F. 2d 114 (Second Circuit, 1931);

Bank of Nova Scotia v. San Miguel, 196 F. 2d 950 (First Circuit, 1952);

Jansson v. Swedish American Line, 185 F. 2d 212 (First Circuit, 1950).

POINT V

The District Courts on their law side do not have jurisdiction of claims founded on the General Maritime Law of the United States unless diversity between the parties is present.

Dismissal of the Jones Act cause of action required consideration of the question of jurisdiction on the basis of diversity. Admittedly no diversity existed between petitioner and respondent Compania. In an endeavor to overcome this lack of diversity petitioner argues that jurisdiction on the law or civil side nevertheless is present in that cases based on the General Maritime Law of the United States are cases wherein the matter in controversy "arises under the Constitution, laws or treaties of the United States, within the meaning of Section 1331 of Title 28 of the U. S. Code". This argument was rejected by the District Court (R. 252a) on the authority of the de-

cision of the Court of Appeals of the Second Circuit in *Paduano v. Yamashita Kisen, et al.*, 221 F. 2d 615, (1955) where Medina, J., writing for that Court said:

"In view of the persistence of this legislative attitude and in the absence of any indication that there are situations in which it has not prevailed, we are constrained to conclude that the Congress, in enacting Section 1331 and its predecessor provisions, intended to exclude from its scope, cases such as the one now before us, in which the general maritime law is the sole substantive basis for awarding the relief claimed in the complaint." (p. 619)

and where Dimock, J., in a concurring opinion, stated:

"The choice between these interpretations is dictated by a further provision of the Judiciary Act of 1789. Section 9 of that Act which contains the grant of jurisdiction of 'civil causes of admiralty and maritime jurisdiction' ends with this sentence: 'And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.'

I cannot escape the conclusion that the Congress which made that provision felt that the district courts to which it applied had been given no jurisdiction to enforce the maritime civil law by a common law remedy." (p. 621)

Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511 (1828), set forth the basic distinction between the district court's jurisdiction over cases in law and equity arising under the Constitution,

over cases in admiralty and over cases affecting Ambassadors, stating at page 545:

"The constitution certainly contemplates these as three distinct classes of cases; and, if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the constitution is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. *A case in admiralty does not, in fact, arise under the constitution or laws of the United States.*" (Emphasis supplied.)

In *The Belfast*, 7 Wall. 624 (1868), this Court discussed the "savings to suitors clause" and declared (at page 643):

"Nothing is said about a concurrent jurisdiction in a State court or in any other court, and it is quite clear that in all cases *where the parties are citizens of different States*, the injured party may pursue the common law remedy here described and saved, in the Circuit Court of the district as well as in the State courts." (Emphasis supplied.)

This Court in *The Belfast* then again stated the requirement that diversity of citizenship must exist if an action, based on the maritime law, is to be brought in the federal courts on the civil side (page 644):

"Property construed, a party under that provision may proceed *in rem* in the admiralty; or he may bring a suit *in personam* in the same juris-

diction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case."

The above principle was restated in *Leon v. Galceran*, 11 Wall. 185 (1870), where this Court, in discussing the rights of mariners to recover their wages, again noted that an action of such a nature may be instituted in the federal civil courts only if there is the requisite diversity of citizenship between the litigants (p. 188):

"Where the suit is *in rem* against the ship or ship and freight, the original jurisdiction of the controversy is exclusive in the District Courts, as provided by the ninth section of the Judiciary Act, but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may, at his election, proceed in an action at law either in the Circuit Court, if he and his debtor are citizens of different States or in a State court as in other causes of action cognizable in the State and Federal courts exercising jurisdiction in common law cases, as provided in the eleventh section of the Judiciary Act." (Emphasis supplied.)

Language to the same effect was enunciated by this Court in *American Steamboat Company v. Chase*, 16 Wall. 522, 533 (1872) and the foregoing quotation in *Leon v. Galceran* was cited with approval by this Court in *Panama R. R. v. Vasquez*, 271 U. S. 557 (1926), at page 560, in its discussion of the "savings

to suitors clause" and tortious claims instituted thereunder.

Judge Magruder in *Doucette v. Vincent*, 194 F. 2d 834 (First Circuit, 1952), attempted to avoid conflict with these decisions by stating that the language used in the cases of *The Belfast*, *Leon v. Galceran*, and *American Steamboat Co. v. Chase*, is dictum, as is the language of *American Insurance Co. v. Canter*, and that the opinion in the latter case "is not one of his [Justice Marshall] most luminous opinions".

Moreover, the basis of the *Doucette* case is misplaced reliance on language of this Court in *Knickerbocker Ice Company v. Stewart*, 253 U. S. 149 (1920), to the effect that the Constitution adopted as laws of the United States approved rules of the general maritime law, and empowered Congress to legislate with respect to them. From this, Judge Magruder reasons that a claim under the general maritime law arises under the Constitution, so as to give a federal district court on the civil side jurisdiction under Section 1331 of Title 28, United States Code. The *Knickerbocker Ice Co.* case dealt only with the authority of Congress to delegate to the several states the power to legislate over maritime matters. Because the Constitution granted this power to the Federal Government, this Court held that the statute in question was unconstitutional. Neither the *Knickerbocker* case nor *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), which was also cited in the *Doucette* case, dealt with the jurisdiction of a district court on the civil side, and there is nothing whatever in these cases which can be relied upon for the proposition that a maritime claim "arises" under the Constitution.

The holding in the *Doucette* case, that a claim founded on the maritime law "arises under the Constitution" so as to give jurisdiction to the district court on the civil side, violates a uniform rule existing over a hundred years that a claim cannot be considered as "arising under the Constitution, treaties or laws of the United States", unless it directly involves a construction of a specific constitutional provision, a specific federal statute, or a treaty which is determinative of the claim. *Gully v. First National Bank*, 299 U. S. 109 (1936); *Schulthis v. McDougal*, 225 U. S. 561 (1912); *King County v. Seattle School Dist.*, 263 U. S. 361 (1923); *Bankers Mutual Casualty v. Minn. St. Paul, etc.*, 192 U. S. 371 (1904); *New Orleans v. Benjamin*, 153 U. S. 411 (1894); *Defiance Water Co. v. Defiance*, 191 U. S. 184 (1903); *First National Bank v. Williams*, 252 U. S. 504 (1920); *Joy v. City of St. Louis*, 201 U. S. 332 (1906); *Porter v. Bennison*, 180 F. 2d 523, 525, cert. den. 340 U. S. 817.

In *Jordine v. Walling*, 185 F. 2d 662 the Court of Appeals for the Third Circuit reiterated the above rule and demonstrated that an action based on the maritime law does not arise under the constitution. The court stated at page 668:

"Nor does the fact that it was the Constitution which adopted and established the rules of the maritime law as part of the law of the United States compel the conclusion that a civil action upon a purely maritime claim is cognizable under that section as one arising under the Constitution itself. For cases arising under the Constitution within the meaning of Article III, Section 2, and Section 1331 which implements it, are only such cases as really and substantially involve a con-

troversy as to the effect or construction of the Constitution upon the determination of which the result depends. Purely maritime cases, such as suits for maintenance and cure, obviously do not involve such a controversy."

It is also the uniform rule that the jurisdictional allegation pleading a claim arising under the constitution, laws or treaties of the United States must appear on the face of the plaintiff's complaint. *Tennessee v. Union & Planters Bank*, 152 U. S. 454 (1894); *Joy v. City of St. Louis*, 201 U. S. 332 (1906); Moore's Commentary On The United States Judicial Code (1949) pages 227 to 231. An examination of the complaint in this action fails to show even an implication that a specific Constitutional provision is in question.

In the *Doucette* opinion, the court recognized that its position violated the ancient mandate that no claim "arises under the Constitution" unless a specific constitutional provision is directly involved. By a supposition that the Constitution had an express provision preserving rights under the general maritime law, it attempted to avoid the destructive effect which this mandate necessarily had on its conclusion. However, the court was constrained to admit that such a constitutional provision did not exist, but nevertheless, felt that the decisions of the Supreme Court in the "Jensen" (*Southern Pacific Co. v. Jensen*, 244 U. S. 205) line of cases remedied this all important defect. However, although decisions of this Court have been held to define and clarify various clauses contained in the Constitution, it has never been suggested, until the *Doucette* case, that deci-

sional law can be relied upon to read clauses into the Constitution which are not therein contained. Moreover, the mandate which the *Doucette* case attempted to avoid has been held to be one of substance and not a mere formality. In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667 (1950), this Court, referring to the rule that a case to "arise" under the Constitution must involve a construction of a clause in the Constitution, stated it has been more careful than in earlier days in enforcing these jurisdictional limitations which are not considered merely technical.

The reference in the *Doucette* case to the case of *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942), illustrates that the first circuit was confusing the jurisdiction of this Court to review an action with the question it was discussing, viz. the jurisdiction of the district court on the civil side to entertain an action. In view of the fact that a claim under the "Jones Act" (Title 46, United States Code, Section 688) was made in the *Garrett* case, the assumption in the *Doucette* opinion at page 842, that the Supreme Court reviewed the state court decision in *Garrett* on the ground that there was involved a right "under the Constitution" is unwarranted.

In *Jordine v. Walling*, 185 F. 2d 662, the Third Circuit pointed out that a case does not necessarily arise under the Constitution, laws or treaties of the United States within the meaning of Section 1331 of Title 28 United States Code, simply because it involves a "federal question" reviewable by the Supreme Court under Section 1257 (3) of Title 28 United States Code. The Court stated at page 688:

"It is true that the merits of a common law action upon a maritime claim, if brought in a

state court, are reviewable by the Supreme Court under Section 1257 (3) of Title 28 U. S. C. because a federal question is involved. But it does not follow that such an action may be brought in a federal district court under Section 1331. For it has been held that a case does not necessarily arise under the Constitution or laws of the United States within the meaning of Section 1331 merely because it involves a federal question, i.e., "title, right, privilege or immunity * * * specially set up or claimed under the Constitution treaties or statutes of * * * the United States" which is reviewable under Section 1257 (3). Thus, while a suit for maintenance and cure involves a "right * * * claimed under the Constitution" in the sense that the Constitution made the ancient maritime law, including its doctrine of maintenance and cure, a part of our national law and is thus within the purview of Section 1257 (3), such a suit is not a case which "arises under the Constitution" in the sense of involving a controversy as to the construction of that document and is, therefore, not within the scope of Section 1331."

In addition to the foregoing, a reading of the *Knickerbocker Ice Company, Jensen and Garrett* cases shows that, in these cases, this court was basically interested in the establishment of a uniform system of maritime law in the United States and not the expansion of the jurisdiction of the district court. See *Panama Railroad v. Johnson*, 264 U. S. 375 page 386 (1924). For this reason, the Supreme Court made the statements in the *Knickerbocker* case and in *Garrett* so heavily relied upon by the court in *Doucette v. Vincent*. We believe that a reading of these opinions

in their proper perspective, illustrates that the Supreme Court was merely attempting to obtain uniformity rather than broaden the district court's jurisdiction.

Diversity must be present between all plaintiffs and all defendants or the Federal Courts do not have jurisdiction on their civil or law side. This is too well established to require argument.

Indianapolis et al. v. Chase National Bank, Trustee, et al., 314 U. S. 63, 69 (1941);

Treinies v. Sunshine Mining Co., 308 U. S. 66, 71, (1939);

Camp v. Gress, 250 U. S. 308, 312, (1919).

That diversity was not present as petitioner was a Spanish national and citizen, and respondent Compañia Trasatlantica was a Spanish corporation.

POINT VI

There is no claim in the complaint for "earned wages". Section 597 of Title 46 of the United States Code has no application.

Petitioner does not claim in his complaint that "wages earned" by him have not been paid. The complaint merely states a cause of action in damages "under General Maritime Law" "for wages to the end of the voyage and for a time thereafter" (R. 200a-R. 201a):

"Fifteenth: That upon information and belief, plaintiff having become injured and ill as afore-said, it was the duty of the defendants herein to

pay for the expense of the plaintiff's maintenance and cure, and to pay him wages to the end of the voyage and for a time thereafter, for all of which the defendants are obligated by General Maritime Law."

It is important to note that this cause of action is specifically stated to be based on "General Maritime Law" and not on Section 597 of Title 46 of the United States Code. This is the statute involved in *Strathearn SS Co. v. Dillon*, 252 U. S. 348, 1920, relied upon by petitioner in Point IV of his brief, page 57, "Pendent jurisdiction; wage claim jurisdiction; diversity jurisdiction".

This Section cannot apply to this claim "for wages to the end of the voyage and for a time thereafter" for it deals only with "wages which * * * have been earned" and which have been demanded from the master by the seaman. It reads:

"§ 597. Payment at ports

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on

the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in the preceding section: *Provided further*, That notwithstanding any release signed by any seaman under section 644 of this title any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. This section shall not apply to fishing or whaling vessels or yachts. R. S. § 4530; Dec. 21, 1898, c. 28, §§ 5, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, § 4, 38 Stat. 1165; June 5, 1920, c. 250, § 31, 41 Stat. 1006."

The claim for "wages to the end of the voyage and for a time thereafter" is simply another element in a claim for damages arising out of petitioner's injury and based on "General Maritime Law", and not on a statute. Accordingly, what has been said in this brief in Point I respecting petitioner's right to sue under the General Maritime Law of the United States in Point V respecting jurisdiction on the civil side of the Federal Courts applies in all respects to this claim.

POINT VII

The Spanish Treaty did not create any right in the plaintiff to maintain suit under the Jones Act or under the General Maritime Law of the United States.

Article VI of the Spanish Treaty referred to by petitioner (Appendix to Petitioner's Brief, page 62) provides that Spanish subjects "shall have free access to the Courts" of the United States. Petitioner does not argue that appellant is not free to bring a suit in an American court. The procedure of American courts is open to him without treaty. An alien has never been denied recourse to our courts.

But Article VI created no substantive right in petitioner to maintain action under the Jones Act or under the General Admiralty Law of the United States. It provides only that he shall enjoy "in what concerns

1. arrest of persons
2. seizure of property
3. and domiciliary visits to their houses, manufactories, stores, warehouses, etc.

the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored nation".

No other rights under American law, either statutory or at common law, are conferred on petitioner by Article VI. Certainly it cannot be argued that the

language of Article VI conferred any right in him to maintain action in our courts under the Jones Act. And it can well be argued that the failure to confer any additional rights, other than those specified, negatived the existence of any other rights.

Article XXIII of the treaty (Appendix to Petitioner's Brief, Page 63) granted to the Spanish Consuls exclusive charge of the "internal order" of Spanish ships. It reserved to the Consuls and the Courts of Spain the resolution of differences between Captains, officers and crew. Disorders were to be dealt with exclusively by these bodies unless they threatened to cause a breach of peace. American authorities were to furnish aid to the Consuls in searching for; arresting, etc. crew members. Arrests were only to be made on the request of the Consuls, the Spanish authorities or the Courts of Spain. Release of persons arrested was to be made at the mere request of such authorities.

Article XXIII neither establishes nor cuts off any substantive American right to recover for injury. None are even mentioned or referred to in it. It seems futile, therefore, for petitioner to argue that its abrogation restored or created a substantive right in him under the General Admiralty Law or under the Jones Act to recover for injury.

Article XXIII did not reserve to the Spanish Consuls, jurisdiction over or settlement of the rights of Spanish seamen arising out of injury aboard Spanish vessels. Such rights are nowhere mentioned in the Article. It is impossible, therefore, to urge that the abrogation of this Article took away from the Consuls

jurisdiction over such rights or that its abrogation created some right under American law in Spanish seamen to recover for injury.

The Court of Appeals correctly held that nothing in the text of these Articles conferred any substantive right. And the Court of Appeals also correctly held that nothing in these Articles supported petitioner's assertions respecting the jurisdictional questions involved.

In no event could the Treaty be construed to waive the jurisdictional requirements of our District Courts.

POINT VIII

The District Court properly declined discretionary jurisdiction in admiralty.

The District Court in declining discretionary jurisdiction in admiralty, stated (R. 252a):

"In the light of the finding hereinabove that under Spanish Law the plaintiff may have compensation for his injury with an additional amount if the defendant Compania is found to have been negligent, and that plaintiff is also accorded under Spanish Law the counterpart of maintenance and cure and that he may assert his claims to a Spanish Consul here, this court should and does decline jurisdiction even in admiralty as a matter of discretion."

There was no error in this holding and it is amply supported by authority.

Canada Malting Co., Ltd. v. Paterson Steamships, Ltd., 285 U. S. 413. (1932), at pp. 420-422:

"* * * The doctrine of these earlier cases was recently reiterated by this Court, in similar terms, in *Langnes v. Green*, 282 U. S. 531, 544, where it was said: 'Admiralty courts . . . have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, "the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum".' See also *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517.

The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts. The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences, or to claims of personal injury. Although such cases are ordinarily decided according to the foreign law, they often concern causes of action arising within the territorial jurisdiction of the United States, compare *Patterson v. The Endora*, 190 U. S. 169; *The Kestor*, 110 Fed. 432, 450."

Pettersen v. The Bertha Brovig, 92 F. Supp. 895 (D. C., S. D., 1950), p. 896:

"American courts have extended themselves to

protect an alien seaman where his circumstances substantially deny vindication and recovery of a just claim. The *Apurimac*, D. C., 7 F. 2d 741, affirmed sub. nom., *Heredia v. Davies*, 4 Cir., 12 F. 2d 500. That was the case of a Peruvian where no Peruvian law to which he could have recourse was submitted to the Court. In this case it is demonstrated without contradiction that under the Norwegian law even in the event of permanent injuries, if libellant can show an inability to reach Norway to press his claim, the Consul General here may entertain and determine it. The size of his recovery, if he obtains one, will not comport with the standards to which American seamen are used but it will be of the size that will represent the obligation which he agreed the vessel assumed in signing him on. We are unable to discover any authority that would serve as a satisfactory precedent for taking jurisdiction in the circumstances and that is one of the norms to guide a Judge in exercising his discretion. The *Apurimac*, supra, 7 F. 2d at page 501."

Johansson v. O. F. Ahlmark & Co., 107 F. Supp. 70 (D. C., S. D., 1952), p. 71:

"The Jones Act is inapplicable to a suit by a foreign seaman who signs articles in a foreign port for service on a foreign ship even if he is injured aboard ship in an American port. The papers submitted fail to show where the instant voyage terminated, but no authority can be found to indicate that if the voyage did end in the United States, that factor alone would justify an exception to the rule. Accordingly, the exception

to the first cause of action under the Jones Act is sustained.

Treating now the first cause of action as a claim for indemnity under the maritime law based on unseaworthiness and the second cause of action for maintenance and cure, entertainment of this suit is a matter of discretion. In the exercise of this discretion, inquiry must be made whether justice will be as well done by remitting the parties to their home forum. If so, jurisdiction will be declined.

It appears that libellant has received and is entitled to substantial benefits in the nature of compensation for his injuries, under the law of Sweden. No injustice will be done if he is left to those remedies."

Koziol v. "The Fylgia", 230 F. 2d 651 (Second Circuit, 1956):

"Libellant, a Polish merchant seaman, signed shipping articles in Argentina on November 7, 1950, to serve as a messman aboard the respondent S. S. Fylgia, a Swedish vessel, and was injured while at sea on November 19, 1950, in descending a stairway on the ship. He has brought to the court below a total of one civil action and three libels, in all of which Judge Clancy has successively refused to take jurisdiction. Originally he made claim under the Jones Act, 46 U. S. C. A. § 688, but appears at present to have given that up, since it is now clear that that Act is not applicable. *Lauritzen v. Larsen*, 345 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254. Later libels have been based on the general maritime law. It is settled law, however, that the district court

had discretion to refuse jurisdiction of this suit in admiralty between foreign nationals; and this discretion will not be reviewed except for abuse. *Canada Malting Co. v. Paterson Steamships*, 285 U. S. 413, 418, 52 S. Ct. 413, 76 L. Ed. 837; *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika og Australie Line*, 2 Cir., 65 F. 2d 392. Attempts of libellant to show some compulsion to accept such claims based on various enactments favoring seamen, such as that allowing seamen to sue without prepaying fees or costs or furnishing security, see 28 U. S. C. § 1916, revising the former § 837, are wholly unconvincing. And there is no ground for holding the trial judge in error in his conclusion that, since the Swedish law so directly controls, the libellant's rights would be adequately, if not better, adjudicated in Swedish tribunals."

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

JOHN L. QUINLAN,
99 John Street,
New York 38, N. Y.,

*Attorney for Respondent Compania
Trasatlantica, also known as Span-
ish Line.*

Of Counsel:

JOHN M. AHERNE,
99 John Street,
New York 38, N. Y.

JAN 13 1958

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. ~~2~~ 3

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN-LUMBER CO., INC.,

Respondents.

**BRIEF OF RESPONDENT GARCIA & DIAZ, INC.
ON THE MERITS**

JOHN L. QUINLAN,
99 John Street,
New York 38, N. Y.,
Counsel for Respondent,
Garcia & Diaz, Inc.

Of Counsel:

JOHN M. AHERNE,
99 John Street,
New York 38, N. Y.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

—against—

**INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE and
GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,**

Respondents.

**BRIEF OF RESPONDENT GARCIA & DIAZ, INC.
ON THE MERITS**

Statement of the Case

In the amended complaint it is alleged that at the time of petitioner's injury respondent Garcia & Diaz, Inc. owned, operated, managed and controlled the S. S. "Guadalupe," the vessel on which petitioner was injured (R. 198a):

"SIXTH: That upon information and belief, at all times hereinafter mentioned, the defendant GARCIA & DIAZ, INC., owned, operated and controlled and managed a certain vessel known as the S. S. GUADALUPE, a vessel of Spanish registry, flying the Spanish flag."

In the amended complaint it is also alleged that petitioner at the time of his injury was employed by respondent Garcia & Diaz, Inc. aboard the "*Guadalupe*" as a seaman (R. 198a):

"SEVENTH: That the plaintiff was employed by the defendants, COMPANIA TRASATLANTICA and GARCIA & DIAZ, INC. on board said vessel, the S. S. GUADALUPE, in the capacity of Able Seaman, at an agreed monthly rate of wages."

At the pre-trial hearing all these allegations were withdrawn by petitioner's counsel except the allegation that respondent Garcia & Diaz, Inc. operated, managed and controlled the vessel at the time of petitioner's injury (R. 4a-R. 5a). The respondent Compania Trasatlantica had admitted in its pleadings that it was the employer of petitioner and owner of the vessel and that it managed, operated and controlled the vessel at the time of petitioner's injury (R. 198a, R. 211a-R. 212a). Despite this petitioner insisted that Garcia & Diaz, also was in operation and control of the vessel (R. 5a). Counsel for petitioner advised the Court he was ready with his proof on this question of operation, control and management by Garcia & Diaz, Inc. and the Court directed a hearing on this question (R. 5a):

"The Court: Are you prepared with proof on that?"

Mr. Puente: Yes, your Honor."

Counsel for petitioner then put in evidence the deposition of the Treasurer of Garcia & Diaz, Inc. previously taken (R. 7a-R. 8a, A. 1a-17a) and the agency agreement between Compania Trasatlantica

and Garcia & Diaz, Inc. (R. 182a, A. 40a-51a). The Treasurer of Garcia & Diaz, Inc. was also examined as a witness on the hearing by petitioner (R. 174a-R. 186a) as well as respondent's representative at the pier at the time of the accident (R. 82a, R. 85a). Counsel for petitioner stated to the Court that the foregoing constituted all the proof he had on the question of operation, control and management of the vessel by Garcia & Diaz, Inc. (R. 86a):

"The Court: Now am I to understand that his testimony as now on the record, coupled with the deposition of William Martinez, or, technically, it is the deposition of Garcia & Diaz, Inc., through William Martinez, constitutes all the proof that you propose to offer on the question of management, operation and control of the Guadalupe on May 12, 1954 by Garcia & Diaz? I want an answer, not a shaking of your head.

Mr. Puente: I am sorry, your Honor. Yes. I have two lawyers here.

Mr. Axtell: There is nothing more to offer."

There was not the slightest suggestion of operation, control, or management by Garcia & Diaz, Inc. in any of this proof offered by petitioner and the District Court in so finding, stated (R. 248a-R. 249a, R. 252a):

"* * * On the basis of the deposition of defendant Garcia, through its treasurer, William Martinez, taken by plaintiff on June 10, 1954, and the contract between defendants Garcia and Compania, it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every respect for its principal, defendant Compania. It appears without contradiction that neither Garcia nor any stockholder thereof

owns any stock in Compania, nor is any director of Garcia a director of Compania; nor does Garcia exercise any control over Compania. It further appears that the relationship between Garcia and Compania originated in 1935 when a partnership, the predecessor of Garcia, commenced representing Compania in this port. That partnership was succeeded by the present corporate defendant, Garcia, and pursuant to a contract made in 1948 between Garcia and Compania, the former has since that time husbanded the latter's vessels in this port. It further appears that defendant Garcia represents as many as ten other Spanish and Cuban ship owners in this port, none of whom is a subsidiary of defendant Compania. It further appears that defendant Garcia did not contribute financially to the purchase or construction of the S. S. Guadalupe. As such agent, defendant Garcia pays the pilot and docking charges and the charges for water and supplies for the vessels of defendant Compania, but all for the account of the defendant Compania. For this service defendant Garcia receives from the defendant Compania commissions, based upon the incoming and outgoing freight and passenger traffic. There was no proof adduced at the pre-trial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to his injury.

In the light of the finding above that the defendant Garcia was solely an agent for the husbanding of the S. S. Guadalupe, plaintiff's Jones Act claim against this defendant must also be dismissed."

ARGUMENT

The action of the District Court in dismissing the complaint as against respondent Garcia & Diaz, Inc. was fully justified by the decisions of this Court in:

Cosmopolitan Shipping Co. v. McAllister, 337

U. S. 783, decided June 27, 1949;

Caldarola v. Thor Eckert & Co., 332 U. S. 155.

Further clear authority for the District Courts action is to be found in the case of:

Buro v. American Petroleum Transport Corporation, et al., 75 F. Supp. 371, aff'd. 168 F.

2d 924, cert. den. 335 U. S. 861 (1948).

In the *Cosmopolitan* case, *supra*, this Court stated (pp. 800-801):

"Thus the cases and an analysis of the relations established by the standard form agreement lead to the conclusion that an agent such as Cosmopolitan, who contracts to manage certain shore-side business of a vessel operated by the War Shipping Administration, is not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel."

In the *Buro* case, *supra*, the Court of Appeals, Second Circuit, said (pp. 926-927) :

"The plaintiffs argue, however, that where the general agent is in fact in possession and control of the vessel, it is liable for negligence resulting from its conduct. They say, further, that in such a situation the agency contract with the Government will not relieve it of responsibility for its torts. We need not consider the validity of this assumption, for the plaintiffs have failed to make any showing of such control and possession on the part of the defendants. The evidence relied on by McGowan no more than demonstrates that the defendant's acts were consistent with the contractual provisions entered into with the Government, while in the *Buro* case, the defendant's affidavit that it managed the 'William Penn' 'in accordance with the terms of the aforementioned General Agency Agreement, and not otherwise,' was not denied. It is settled that the general agency agreement does not make the agent the owner pro hac vice of the vessel so as to impose liability on the agent for injuries such as we have here. It would be an absurdity in such circumstances to impose liability on the agent where its acts have been in accordance with the provisions of the agreement and consistent therewith. That is the situation we have here."

It is to be noted that the *Buro* case was decided on a motion for summary judgment before trial (75 F. Supp. 371). The proof of the plaintiff in that case failed to show any evidence of operation, control or management by the agent and failed to evidence any neglect on the agent's part contributing to the plain-

tiff's injury. There was no basis whatever for continuing the suit against the defendant and the motion for judgment had to be granted.

Similarly here there was no showing of operation, control or management by respondent or of any neglect on its part contributing to petitioner's injury. The District Court, accordingly, was correct in dismissing the complaint against respondent Garcia & Diaz, Inc. The District Court did no more than it would have been required to do at the close of the plaintiff's case had the action been actually on trial.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

JOHN L. QUINLAN,
99 John Street,
New York 38, N. Y.,
*Counsel for Respondent,
Garcia & Diaz, Inc.*

Of Counsel:

JOHN M. AHERNE,
99 John Street,
New York 38, N. Y.

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JOHN T. FEY, Clerk.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~32~~ 3.

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRAS-
ATLANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, Inc., and QUIN LUMBER CO., INC.,

Respondents.

BRIEF FOR RESPONDENT, QUIN LUMBER CO., INC.

SIDNEY A. SCHWARTZ

Counsel for Respondent,
Quin Lumber Co., Inc.
76 Beaver Street
New York 5, New York

WILLIAM J. KENNEY
Of Counsel

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POINT I

The petitioner, a Spanish seaman, is not entitled to the benefits of the Jones Act against his employer, a Spanish shipowner, for injuries which occurred on a foreign flagship upon which the petitioner was serving under Spanish articles which incorporated the Spanish law

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POINT II

The claims asserted by the petitioner herein, based on the General Maritime Law, are not claims which arise under the constitution, laws or treaties of the United States within the meaning of 28 U. S. C. §1331

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POINT III

There is no pendent jurisdiction of the second, third and fourth causes of action

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

—against—

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRAS-
ATLANTICA, also known as SPANISH LINE and GARCIA &
DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

BRIEF FOR RESPONDENT, QUIN LUMBER CO., INC.

Opinions Below

The opinion of the District Court (R. 247a-253a) is reported at 142 F. Supp. 570. The opinion of the United States Court of Appeals for the Second Circuit (App., p. 47 of Petition) is reported at 244 F. 2d 409. |

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petitioner's brief.

Question Presented

In the absence of complete diversity of citizenship between an alien seaman and each of the defendants does

the District Court have jurisdiction on the civil side of a claim for personal injuries sustained on a vessel in navigable waters by the mere sham allegation of the alien seaman that he invokes the benefits of the Jones Act, 46 U. S. C. §688, against his employer, an alien shipowner, one of several defendants in this action?

Statutes Involved

The statutes which are involved are 28 U. S. C. §1331, §1332 and 46 U. S. C. §688. These are set forth in the Appendix to Petitioner's brief.

Statement

When this matter came on for trial in the District Court, the defendants moved to dismiss the action in view of the Court's lack of jurisdiction of the subject matter of this action, i.e., no Jones Act had been, or could be, properly asserted by the petitioner against Compania (Spanish Line) and there was an absence of complete diversity of citizenship between the petitioner and each of the defendants, respondents here.

Since that question depended upon the status of the parties vis-à-vis and their nationality (R. 2a) the Court took proof as to the *facts upon which jurisdiction had been alleged*. It did *not* decide this case on the *merits*. A decision on the merits would have been a finding of liability to pay damages on the part of one or more of the respondents or the absence of liability of all respondents. That would have been a decision on the *merits*.

The District Court first sought a stipulation of those jurisdictional facts which were not in dispute.

It was stipulated upon the hearing to determine jurisdiction of the subject matter herein that the citizenship of the parties was as follows (p. 572 of 142 F. Supp.):

- (a) Plaintiff was a Spanish national.
- (b) Defendant, International Terminal Operating Co., hereinafter referred to as International, was a Delaware corporation.
- (c) Defendant, Spanish Line, was a Spanish corporation.
- (d) Defendant, Garcia & Diaz, hereinafter referred to as Garcia, was a New York corporation.
- (e) Defendant, Quin Lumber Co., Inc., hereinafter referred to as Quin, was a New York corporation.

Manifestly, we have a Spanish subject suing a Spanish subject and 3 citizens of states of the United States on the civil side of the federal Court.

It was and is the contention of Quin that, since both the petitioner and Spanish Line are aliens, the District Court lacked jurisdiction over the subject matter of the instant action and correctly so held. A determination of the soundness of such contention necessitates an analysis of the amended complaint.

In essence, this is an action brought by a foreign seaman to recover damages for personal injuries sustained while aboard the S. S. Guadalupe on May 12, 1954 by reason of the alleged negligence of the defendants. Four causes of action are set forth in the amended complaint.

The first cause of action was asserted against the Spanish Line and Garcia under the Jones Act, 46 U. S. C. §688, and the General Maritime Law (R. 197a-206a).

The second cause of action was asserted against Spanish Line and Garcia under the General Maritime Law for wages to the end of the voyage and for maintenance and cure (R. 201a).

The third cause of action was directed solely against the defendant International and consists of allegations to the effect that it was the negligence of International which caused injury to the plaintiff. It is to be noted that in paragraph "TWENTIETH" of the amended complaint it is alleged as follows (R. 202a):

"The jurisdiction of this Court in regard to plaintiff's claim against the defendant INTERNATIONAL TERMINAL OPERATING Co. is predicated upon diversity of citizenship between the plaintiff and INTERNATIONAL TERMINAL OPERATING Co. and the amount in controversy is in excess of THREE THOUSAND (\$3,000) DOLLARS exclusive of interest and costs, and in addition, said injuries sustained by the plaintiff arose in navigable waters and therefore, said cause of action against the defendant INTERNATIONAL TERMINAL Co. is cognizable under the Constitution of the United States and the General Maritime Law of the United States."

The fourth cause of action set forth in the amended complaint, although purportedly asserted against Quin for its alleged negligence which caused the plaintiff's injuries, contains in paragraph "TWENTY-NINTH" allegations of negligence on the part of each of the defendants-appellees (R. 204a) herein. In so far as the District Court's jurisdiction over the cause of action asserted against the defendant Quin is concerned, it is alleged in paragraph "TWENTY-EIGHTH" of the amended complaint as follows (R. 204a):

"The jurisdiction of this Court in regard to plaintiff's claim against the defendant QUIN LUMBER Co., Inc., is

predicated upon diversity of citizenship between the plaintiff and QUIN LUMBER Co., INC., and the amount in controversy is in excess of THREE THOUSAND (\$3,000.00) DOLLARS exclusive of interest and costs, and in addition, said injuries sustained by the plaintiff arose in navigable waters, and theretofore, said cause of action against the defendant QUIN LUMBER Co., INC., is cognizable under the Constitution of the United States and the General Maritime Law of the United States."

It is thus clear that this action, considered as a whole, is one for damages for personal injuries allegedly caused by the negligence of each of the four respondents herein, notwithstanding the fact that the District Court's jurisdiction was invoked and bottomed on different bases respecting the various defendants.

Without allowing any proof as to the manner in which the accident occurred and therefor in no way determining whether there was negligence on the part of any of the respondents herein, which would then be a determination on the merits, the District Court correctly determined that it first had to find whether the allegation that the alien seaman, petitioner herein, was entitled to the benefits of the Jones Act, 46 U. S. C. §688, was a sham allegation—this, in order to dispose of one facet of the jurisdictional question. The District Court found that the allegation that the petitioner was a seaman entitled to invoke the benefits of the Jones Act was a sham allegation and finding no basis for jurisdiction under the Jones Act and no other basis for retention of this matter on the civil side of the Court the District Court gave the petitioner the choice to transfer the action to the admiralty side of the Court (R. 188a-189a). Upon the petitioner refusing and

upon the District Court's determination that it had no jurisdiction on the civil side it dismissed the complaint.

The Court of Appeals affirmed said dismissal on the District Court's "workmanlike opinion below which contains a full statement of the facts" (p. 410 of 244 F. 2d).

After the affirmance by the Court of Appeals for the Second Circuit of the dismissal of petitioner's complaint, petitioner instituted an action against all the respondents in the Supreme Court of the State of New York, New York County, and said action is presently pending in that court.

Argument

The petitioner's sham allegation that he was entitled to proceed under the Jones Act did not vest the District Court with jurisdiction of that cause of action. The evidence which was adduced on the jurisdictional questions of fact under the Jones Act dictated a dismissal of that cause of action.

There being no diversity of citizenship between the plaintiff and every defendant, there was no jurisdiction on the law side of the District Court of the petitioner's remaining causes of action. The petitioner's remaining causes of action were not claims arising under the Constitution or laws of the United States.

In the absence of a valid primary jurisdiction there could be no pendent jurisdiction entitling petitioner to trial by jury of the second, third and fourth causes of action.

7

POINT I

The petitioner, a Spanish seaman, is not entitled to the benefits of the Jones Act against his employer, a Spanish shipowner, for injuries which occurred on a foreign flagship upon which the petitioner was serving under Spanish articles which incorporated the Spanish law.

It will not be the function of this brief to treat extensively with the right of the petitioner, a foreign seaman, to the benefits of the Jones Act. We assume that Spanish Line, the foreign shipowner, and various *amici*, foreign sovereigns and shipowners, will present full argument on that subject.

In view of this Court's consideration of this problem in *Lauritzen v. Larsen*, 345 U. S. 571, 73 S. Ct. 921, and its holding it would be an act of supererogation for this respondent to outline the many considerations that point up the conclusion that the Jones Act, 46 U. S. C. §688, does not give to the petitioner a right of action against his foreign employer. As one excellent treatise (*Gilmore and Black, The Law of Admiralty*, p. 389) has said in dealing with the *Lauritzen* case:

"It would have been, Justice Jackson pointed out, entirely within the power of Congress to have enacted a statute directing our courts to take jurisdiction of, and to apply our law to, maritime personal injury cases whether or not there was any domestic contact beyond the fact that the court had jurisdiction of the parties. Nevertheless, he concluded, on a review of the legislative history there was no persuasive proof that Congress had so intended."

In an attempt to bolster his argument that Congress intended to *specifically* cover foreign seamen under the Jones Act the petitioner by setting forth the debates in Congress which resulted in the enactment of §688 of 46 U. S. C. (commonly referred to as the Jones Act) and *other* sections, argues that Congress legislated with respect to personal injuries of foreign seamen in view of this Court's opinion in *Strathearn S. S. Co. v. Dillon*, 252 U. S. 354, dealing with wages of foreign seamen. He then argues that there was no need to enact the Jones Act insofar as *American* seamen were concerned and therefor the Jones Act was directed to foreign seamen. That this is palpably wrong is seen from a review of the background leading to the enactment of the Jones Act. *Engel v. Davenport*, 271 U. S. 33, 46 S. Ct. 410; *McAfoos v. Canadian Pacific Steamships*, 243 F. 2d 270, 271; *Robinson on Admiralty*, p. 309 *et seq.*; *Willock, Commentary on Maritime Workers*, preface to 46 U. S. C. §688; *Gilmore and Black, The Law of Admiralty*, p. 279 *et seq.*

Since the petitioner has not shown (and we respectfully submit could not show) that Congress intended foreign seamen to be embraced by the Jones Act with respect to a claim for personal injuries against a foreign shipowner, the District Court, a court of recognized limited jurisdiction, had no jurisdiction of the Jones Act cause of action.

If the petitioner was entitled to the benefits of the Jones Act and therefor properly invoked the limited jurisdiction of the District Court, all of the remaining questions of law become academic. Contrariwise, if the Jones Act was never available to the petitioner, his mere sham allegation that he was entitled to the benefits of the Jones Act could not confer jurisdiction on the District Court. Otherwise, the mere assertion by a plaintiff that he is entitled to

the benefits of a federal statute which creates a right would deprive a District Court from making an initial inquiry into the *jurisdictional facts*.

That would dictate a District Court in the case of a Jones Act suit hearing all evidence dealing with the merits, i.e., was the shipowner negligent, did the negligence proximately cause the injury and what damages are recoverable by the plaintiff, and after a protracted trial determine that it did not have jurisdiction of the controversy in that the foreign seaman in the first instance could not have invoked the Jones Act. It is respectfully submitted that this Court did not by its statement at page 575 of 345 U. S. (*Lauritzen v. Larsen*) intend to indicate or hold that the mere assertion by the plaintiff of jurisdictional facts deprives the District Court of inquiry into the same. If it did, it would necessarily follow that a plaintiff's allegation that there was diversity of citizenship between the plaintiff and each defendant could not be inquired into. Those are the *jurisdictional facts* in a diversity of citizenship case. The *jurisdictional facts* in *this* action, asserted by the plaintiff-petitioner, are that he has a right to sue under the Jones Act.* The evidence was otherwise.

If the *mere assertion* clothed the District Court with jurisdiction and power to hear the entire controversy, although the facts showed the allegations to be false, then a premium is put on falsity and all other questions of jurisdiction are rendered academic.

* As was said in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 504:

“ • • • A right is a well founded or acknowledged claim;
• • • ”

POINT II

The claims asserted by the petitioner herein, based on the General Maritime Law, are not claims which arise under the Constitution, laws or treaties of the United States within the meaning of 28 U. S. C. §1331.

Considerations of Jones Act jurisdiction aside, Point I, *supra*, we come to the jurisdiction of the District Court by virtue of §1331 of 28 U. S. C. which is the "federal question" statute.*

The language which is presently found in §1331 of 28 U. S. C., formerly the Judiciary Act of 1875 (§1, Act of March 3, 1875, 43 Cong., 2nd Sess., chap. 137, 18 Stat. 470), takes its wording from Article III, §2, of the Constitution (*Hart & Wechsler, The Federal Courts and the Federal System*, pages 727-730, 749-752).

That Article III, §2 of the Constitution embraced 3 separate and distinct classes of cases and that cases within the admiralty jurisdiction did not "arise under" the Constitution was stated by this Court in 1828 in *American Insurance Co. v. Canter*, 1 Pet. 541, 545:

"The Constitution certainly contemplates these as three distinct classes of cases, and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, o

* Since the plaintiff is an alien and one of the defendants is also an alien we do not have complete diversity of citizenship between the plaintiff and each of the defendants so that there is no jurisdiction under §1332 of 28 U. S. C. *Salem Co. v. Manufacturers Finance Co.*, 264 U. S. 182, 44 S. Ct. 266; *Camp v. Gress*, 250 U. S. 308, 39 S. Ct. 478; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 60 S. Ct. 44; *Compania Minera Y Compradora etc. v. American Metal Co.*, 262 F. 183; *Ex Parte Edelstein*, 30 F. 2d 636.

is, we think, conclusive against their identity. If it were not so—if this were a point open to inquiry—it would be difficult to maintain the proposition that they are the same. *A case in admiralty does not, in fact, arise under the Constitution or laws of the United States.*” (Italics supplied.)

If an action at law were to be brought in connection with a maritime tort, a separate basis of jurisdiction, e.g., diversity of citizenship, must be found. Thus, in *The Belfast*, 7 Wall. 624, this Court said (p. 643):

“Nothing is said about a concurrent jurisdiction in a State Court or in any other court, and it is quite clear that in all cases *where the parties are citizens of different States*, the injured party may pursue the common law remedy here described and saved, in the Circuit Court of the district as well as in the State Courts.” (Italics supplied.)

And at page 644:

“Properly construed, a party under that provision may proceed *in rem* in the admiralty; or he may bring a suit *in personam* in the same jurisdiction; or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State Courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case.” (Italics in original.)

To the same effect, see

Leon v. Galceran, 11 Wall. 185;

American Steamboat Company v. Chase, 16 Wall. 522, 533;

Panama RR Co. v. Vasquez, 271 U. S. 557.

It is respectfully submitted that the considerations, which commend to this Court the holding that the District Court on the law side has no jurisdiction of a claim for personal injuries, absent diversity of citizenship, as one arising under the Constitution or laws of the United States, are set forth in *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615 and *Jordine v. Walling*, 185 F. 2d 662.

If adherence to the principle that a claim "arising under the Constitution, treaties or laws of the United States" must directly involve the construction of a specific constitutional provision, federal statute or treaty, which construction would be dispositive of the claim, *Gully v. First National Bank*, 299 U. S. 109, then certainly the reasoning of the Court of Appeals for the Third Circuit in *Jordine v. Walling*, 185 F. 2d 662, is indeed significant (p. 668):

"Nor does the fact that it was the Constitution which adopted and established the rules of the maritime law as part of the law of the United States compel the conclusion that a civil action upon a purely maritime claim is cognizable under that section as one arising under the Constitution itself. For cases arising under the Constitution within the meaning of Article III, Section 2, and of Section 1331 which implements it, are only such cases as really and substantially involve a controversy as to the effect or construction of the Constitution upon the determination of which the result depends. Purely maritime cases, such as suits for maintenance and cure, obviously do not involve such a controversy."

Petitioner would have this Court hold that the Act of March 3, 1875, presently 28 U. S. C. §1331, granted to the District Court original jurisdiction of every case of which this Court had appellate jurisdiction (p. 22 of Brief of Pet.).

He argues therefrom that since this Court has authority to review "federal question" cases involving the substantive maritime law, the District Court therefor has original jurisdiction. Reliance is seemingly placed upon decisions like *Garrett v. Moore McCormack*, 317 U. S. 219. That such a position is untenable, we submit, is answered in *Jordine v. Walling*, 185 F. 2d 662, as follows (p. 668):

"It is true that the merits of a common law action upon a maritime claim, if brought in a state court, are reviewable by the Supreme Court under Section 1257(3) of Title 28 U. S. C. because a federal question is involved. But it does not follow that such an action may be brought in a federal district court under Section 1331. For it has been held that a case does not necessarily arise under the Constitution or laws of the United States within the meaning of Section 1331 merely because it involves a federal question, i.e., a 'title, right, privilege or immunity * * * specially set up or claimed under the Constitution, treaties or statutes of * * * the United States', which is reviewable under Section 1257(3). Thus, while a suit for maintenance and cure involves a 'right * * * claimed under the Constitution' in the sense that the Constitution made the ancient maritime law, including its doctrine of maintenance and cure, a part of our national law and is thus within the purview of Section 1257(3), such a suit is not a case which 'arises under the Constitution' in the sense of involving a controversy as to the construction of that document and is, therefore, not within the scope of Section 1331."

We submit that in the *Garrett* case, *supra*, as well as in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, relied upon by petitioner (Pet. Brief, pp. 27-28), this Court was interested in establishing a uniform system of maritime

law which would have been frustrated if state substantive concepts of burden of proof as to releases were followed or if a state could legislate with respect to employees in maritime work.

Nor does the "saving to suitors" clause (Section 1333 of 28 U. S. C.) come to the aid of the petitioner herein since that clause was not an affirmative grant of jurisdiction but merely excepted from the exclusive maritime or admiralty jurisdiction of the District Courts all cases in which actions could be brought for remedies other than admiralty remedies to which suitors were "otherwise entitled." *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F. 2d 615; 617. In order for the petitioner to succeed on the arguments that he has advanced dealing with the jurisdiction of the District Court under Section 1331 of 28 U. S. C. distinguished precedents must be overruled. *Gilmore & Black, The Law of Admiralty*, §6-62, pages 385-386.

The petitioner has shown no legislative intent which supports the arguments which he has advanced.

If the petitioner's argument respecting Section 1331 is to be adopted there can be no question that there will be a tremendous volume of new matters in the Federal Court by reason of actions initially instituted therein and by reason of removals to the District Court by defendants under the provisions of §1441(b) of 28 U. S. C. of actions initially commenced in State Courts.

The "saving to suitors" clause will in matters involving maritime torts amount to a promise to the ear only to be broken to the hope of suitors who wish to avail themselves of an appropriate state forum.

POINT III

There is no pendent jurisdiction of the second, third and fourth causes of action.

As has been indicated heretofore if this Court finds jurisdiction to exist under the Jones Act so that the petitioner, as a foreign seaman suing a foreign shipowner for damages for personal injuries occurring on a foreign flagship in waters of the United States, with a Spanish contract of seamanship involved, had a right to invoke the benefits of said Act, then this point is academic.

Cases dealing with pendent jurisdiction seemingly stem from this Court's decision in *Hurn v. Oursler*, 289 U. S. 238. The difficulty that attends this question is seen from a reading of *Doucette v. Vincent*, 194 F. 2d 834; *Jordine v. Walling*, 185 F. 2d 662; *Mullen v. Fitz-Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82; *Troupe v. Chicago, Duluth & Georgian Bay Transit Co.*, 234 F. 2d 253; *McAfoos v. Canadian Pacific Steamships*, 243 F. 2d 250; *Jenkins v. Roderick*, unofficially reported in 1957 A. M. C. 2325.

In order for pendent jurisdiction to be applicable the District Court must have jurisdiction initially of a substantial claim within its jurisdiction. *Howard v. Furst*, 238 F. 2d 790, 794.

In the instant matter if the plaintiff had no right under the Jones Act to begin with then this Court never initially had jurisdiction to begin with. Therefore there would be no jurisdiction "pendent" upon an initially valid jurisdiction.

If the petitioner by any oblique reference to his wage claim, the second cause of action in his amended complaint (R. 201a), seeks to intimate that jurisdiction over all causes

of action are pendent upon his wage claim then it must be recognized that his wage claim (R. 200a-201a) seeks *wages to the end of the voyage*. He does not seek any proportion of wages which had been *earned*. Therefore, §597 of 46 U. S. C. is not at all involved since there is no allegation of withholding of earned wages which would bring the petitioner within the compass of §597 of 46 U. S. C.

The petitioner's dilemma in this case is dictated by his desire to have a trial by jury in the Federal Court in contrast to transferring this matter to the admiralty "side" of the District Court which had been offered to, and refused by, him (R. 189a, 252a).

He has availed himself of the "saving to suitors" provision of Section 1333 of 28 U. S. C. by his institution of an action against all of the defendants-respondents here involved in the Supreme Court of the State of New York, County of New York.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed in all respects to which end this brief is

Respectfully submitted,

SIDNEY A. SCHWARTZ

Counsel for Respondent,
Quin Lumber Co., Inc.
 76 Beaver Street
 New York 5, New York

WILLIAM J. KENNEY
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~302~~ 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA, also known as SPANISH LINE,
and GARCIA AND DIAZ, INC. and QUIN LUMBER CO., INC.,

Respondents.

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, *AMICUS CURIAE*

LAWRENCE HUNT,

*Counsel for The Government of the United
Kingdom of Great Britain and Northern
Ireland,*

55 Liberty Street,
New York 5, N. Y.

DANIEL L. STONEBRIDGE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,
Petitioner,
against

INTERNATIONAL TERMINAL OPERATING
Co., COMPAÑIA TRASATLANTICA, also
known as SPANISH LINE, and GARCIA
AND DIAZ, INC. and QUIN LUMBER
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Respondents.

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief is filed by The Government of the United Kingdom of Great Britain and Northern Ireland as *amicus curiae*, because the legal principles and practical consequences involved in this case are of paramount importance to all maritime nations, including the United Kingdom, whose vessels touch the territorial waters of the United

States of America and from time to time tie up at piers within those waters in the course of their movements in international trade.

This Honorable Court, in *Lauritzen v. Larsen*, 345 U. S. 571, largely clarified the scope of the Jones Act in its application to foreign seamen, emphasized the fundamental and far-reaching considerations affecting and controlling international carriage by sea as opposed to the "fortuitous" and transitory factors involved, and set forth certain factors which, alone or in combination, influence the choice of law to govern a maritime tort claim. In that case, this Court held that the fact that a foreign seaman had signed on a foreign ship at a United States port was a "fortuitous" factor which did not require the application of United States Law to a tort occurring in foreign waters. It applied, with impressive emphasis on comity and the practical usage of the sea, the ancient and most universal rule of maritime law—the law of the flag.

Further clarification of the Jones Act and of the applicable maritime law is required by the instant case. Certain points of domestic law having no direct impact on maritime law, and the propriety of procedural matters in the lower courts, are not a proper concern of this brief.

But it does seem appropriate and of the highest importance, and, it is respectfully hoped, of some help to this Honorable Court, that this brief point out the necessity for protecting the free flow of international commerce by sea, of applying in like manner to the instant case those principles of comity and practical usage so lucidly expounded and applied in the *Lauritzen* case.

In the instant case, this Court has been asked to decide that the Jones Act should be applied to the claim of a Spanish seaman employed on a Spanish vessel, injured aboard the vessel in a United States port and treated ashore in the United States, despite there being remedies available under Spanish law and despite the shipping

articles under which the seaman was employed specifically providing that all claims against the employer were to be dealt with under the laws of Spain, in Spain, or before a representative of the Spanish Government.

POINT I

It is just and reasonable for seamen and shipowners to agree that their respective rights and liabilities shall be determined in accordance with the law of their common nationality, the flag of the vessel and the place of the contract—in the instant case a Spanish seaman, a Spanish shipowner, a Spanish ship and Spanish shipping articles incorporating Spanish Law—and both the interests of justice and reasons of comity should sustain the agreement in the instant case.

This Court, in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, in discussing the duties of courts in respect to contracts, has said that the reason for the existence of terms and conditions in contracts is immaterial if they have been accepted and agreed upon by the parties. The function and duty of the courts are not to make a new contract for them but “consist simply in enforcing and carrying out the one actually made.”

The district court, in the instant case, has found that the contract of employment specifically provided that the parties submitted themselves to the established Spanish laws of Labor and Commerce and agreed that in the event of accident these laws and the Spanish social insurance laws would apply. The district court also found on the evidence that the Spanish law would permit a recovery of maintenance and cure and a pension for life of between 35% and 55% of the seaman's wage with a probability of an increased pension if negligence of the shipowner is established.

It will be recognized that social conditions in Spain, the United States of America, Great Britain and other maritime countries differ greatly as do their wage scales, climate, laws and tastes in food. But it will also be recognized that it is not the function of any nation to force a uniformity of social conditions or laws on other nations. Each individual maritime country, based upon its own economic system, state of social advancement, standard of living and the will of its citizens, has the right to enact legislation setting forth the rights and obligations of its shipowners and its seamen. Attempts by any other country, by legislation or judicial action, to write laws governing the obligations and liabilities of a foreign shipowner to its seamen is a departure from the law of the flag so serious as to warrant this Court's consideration. Although social legislation, and in particular legislation concerning benefits due to seamen injured in the service of their vessel, differs in individual countries, this fact does not give another country the right to impose its standards upon foreign shipowners in their relations with citizens of the country of the vessel's flag. To hold otherwise would almost destroy the historical and prevailing doctrine that questions concerning the internal economy and discipline of a vessel are to be determined by the law of the vessel's flag.

International maritime law is a prime example of the successful obedience by maritime nations in their relations with each other to the old precept, "bear and forbear". As this Court pointedly said in the *Lauritzen* case, at page 582:

"in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor shall we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

Basically, just as in the United States, in foreign maritime countries the general international maritime law is supplemented by statutes, codes or regulations and judicial decisions which regulate the relationship between seamen and shipowners. In many such countries the shipowner is required to contribute to compensation funds and to the maintenance of institutions established for the welfare of seamen. In those countries the seamen are, in the event of injury, provided with compensation in amounts related to the nation's social development and scale of living. To compensate an injured seaman on a different scale would be to deprive the shipowner of the benefits of the fund to which he was forced by his government to contribute, force upon him in many cases a double liability, and, in some instances, could result in a financial loss to the seaman.

If the decision of the Court of Appeals in the instant case were to be reversed on the basis of the principle of *lex loci delicti*, applicable to torts on land, one foreign seaman injured in an American port would have substantive rights and a measure of recovery quite different and, generally speaking, a quantum of recovery much in excess of other seamen serving on the same vessel under the same articles who had been injured on the vessel at other than an American port. The interests of justice, as well as the persuasive considerations of comity, require that two foreign seamen signing articles drawn in accordance with the law of their nationality serving on the same vessel of their nation's flag should be equally compensated for the same injury and their recompense measured in accordance with the social standards of the country of their citizenship. The verdict of a New York City jury assessing the damages of an injured Japanese seaman might well exceed the award of a Japanese court by 10 to 1. Obviously, the interests of justice would not be served if one Japanese seaman who had been injured on a vessel of his country's flag while fortuitously in an American port were given this great advantage over a fellow Japanese seaman performing the same services who had been injured in Osaka.

In the instant case, aside from the fact that a Spanish vessel happened to be in United States territory when an injury occurred, there are no American factors or interests involved in the action. It will in no manner affect or limit the rights and liabilities of American seamen or shipowners for this Court to refer the Spanish seaman to his Spanish remedies. In the circumstances that was his and the shipowner's bargain. It is both just and reasonable that this bargain be sustained.

POINT II

The "fortuitous" fact that a vessel is temporarily present in territorial waters of a country other than her flag's when an injury occurs should not affect the historic doctrine that matters involving the internal economy of a vessel are to be determined in accordance with the law of the vessel's flag.

This Court discussed in the *Lauritzen* case, at pp. 583-4, the *lex loci delicti commissi*, as one of the seven factors to be considered and cited *Carr v. Francis Times & Co.* (Eng.) (1902) AC 176-HL, as applying that factor. See also *MacKinnon v. Iberia Shipping Co.* (1954) 2 Lloyd's Rep. 372, a Scottish case which also cited *Carr v. Francis Times & Co.* But this Court said, at p. 584:

"the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag."

Moreover in the *Lauritzen* case (345 U. S. at p. 583), this Court recognizes that the principle of *lex loci delicti*, applicable to torts on land, is of limited application to maritime torts because a ship, moving from place to place, is frequently changing "laws". Perhaps, that is the reason for this Court, in reviewing the several factors which

are considered in determining what law applies to a given maritime tort, said (345 U. S. at pp. 585-586):

"This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. *United States v. Flores*, 289 U. S. 137, 155-159, 77 L. ed. 1086, 1093-1095, 53 S. Ct. 580, and cases cited * * *.

"It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in *United States v. Flores*, supra (289 U. S. at 158), and iterated in *Cunard S. S. Co. v. Mellon*, supra (262 U. S. at 123):

"And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require"

"This was but a repetition of settled American doctrine."

It should also be remembered, in the instant case, that the Jones Act is "primarily at any rate a local statute" (*Kyriakos v. Goulondris*, 151 F. 2d 132, 139, dissenting opinion of Cir. Ct. Judge Learned Hand) and the clearest and gravest warrant is required before it is substituted for the law of the flag.

Of the seven factors referred to in the *Lauritzen* case "which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim", six factors point directly to the application of Spanish law. The vessel's flag is Spanish. The injured seaman is Spanish. The shipowner is Spanish. The contract of employment was entered into in Spain. The Spanish seaman can present his claim to Spanish representatives here in the United States. While an American forum has perfected jurisdiction over the parties, the connection of the controversy with the United States is slight and involves only the internal economy of a Spanish vessel. The mere existence of one transitory and "fortuitous" fact—that the accident occurred in American waters—should not override all the other and more weighty signposts pointing to Spain. Surely the place of the accident is no less "fortuitous" in the instant case than the place of contract in the *Lauritzen* case.

CONCLUSION

It is respectfully submitted that this Court should affirm the dismissal of the complaint.

Dated, New York, N. Y.,
January 9, 1958.

Respectfully submitted,

LAWRENCE HUNT,
*Counsel for The Government of the
United Kingdom of Great Britain
and Northern Ireland,*
55 Liberty Street,
New York 5, N. Y.

DANIEL L. STONEBRIDGE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~100~~ 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA, also known as SPANISH LINE,
and GARCIA AND DIAZ, INC. and QUIN LUMBER CO., INC.,

Respondents.

BRIEF OF THE GOVERNMENT OF DENMARK, *AMICUS CURIAE*

LAWRENCE HUNT,

Counsel for The Government of Denmark,

55 Liberty Street,

New York 5, N. Y.

DANIEL L. STONEBRIDGE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

FRANCISCO ROMERO,
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INTERNATIONAL TERMINAL OPERATING
Co., COMPANIA TRASATLANTICA, also
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Co., Inc.,

Respondents.

BRIEF OF THE GOVERNMENT OF DENMARK, *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief, *amicus curiae*, is filed by The Government of Denmark because the legal principles and practical problems involved in this case are of the gravest concern to all maritime nations, particularly those nations, including Denmark, whose economic survival depends to a major degree on its shipping and ship-carrying industry.

In *Lauritzen v. Larsen*, 345 U. S. 571, this Honorable Court held that the fortuitous fact that a Danish seaman

had signed on a Danish ship at a United States port, under shipping articles which provided that all claims against the Danish shipowner were to be dealt with under the laws of Denmark, did not require the application of United States law to a maritime tort occurring outside the territorial waters of the United States but did require the application of the law of the flag.

In the instant case, this Court has been asked to apply the Jones Act to the claim of a Spanish seaman who had signed on a Spanish ship at a Spanish port under shipping laws which provided that all claims against the Spanish shipowner were to be dealt with under the laws of Spain and who had been injured aboard the ship in the port of New York.

It would not be appropriate for this brief to deal with the procedural problems involved. But it does seem appropriate and of supreme importance for this brief to point out the vital reasons why the *Lauritzen* case should be not only affirmed but extended to govern the instant case by the application of the law of the flag.

POINT I

The United States of America should not impose its substantive law on foreign seamen and shipowners who have agreed in advance that the law of their nationality would be applied to claims between them.

Throughout the world maritime nations have developed systems of law establishing the respective rights and liabilities of seamen and shipowners who sail under the flag of those nations. These systems differ greatly but are adapted to the peculiar social and economic structure of the nation in which they apply. This is as it should be, for living standards vary greatly and what would constitute adequate wages or adequate compensation in one country

might well be totally inadequate or grossly excessive in another country. It would be just as inequitable for a high income nation to force an employer from a low income nation to compensate a seaman on the basis of the high income nation's standards as it would be to force a seaman from a high income country on a ship of his country's flag to accept compensation of a low income nation's standard. In brief, an American seaman, wherever his ship happens to be at the time of an injury, should be compensated on the basis of American standards. Similarly, a Spanish or a Danish seaman serving on their nation's vessels should be compensated on the basis established by the laws of their vessel's flag.

In the present case, the lower court has found that under the Spanish law the plaintiff-petitioner has a right to a lifetime pension and to the equivalent of maintenance and cure. This is what the parties to the shipping articles expected to pay and receive, in the event of an injury, when the articles were signed. They did not intend nor contemplate that their rights and obligations would be determined by the law of some foreign country—possibly one less favorable to the seaman. It was natural and reasonable for them to contract for the law they knew, the law of their nationality, their ship's flag, the place of the contract, to govern their relationship. It was not their intention that one party could choose the law most favorable to his position in the event of a claim.

This Court will not be unmindful that the Danes have been a sea-faring people for a long time. Whatever may be said of their exploits in distant ages, their economic survival, even more today than in times past, depends on their ships. This Court, which deals daily with the business and livelihood of men, will, it is respectfully hoped, not be oblivious to the economic factors so vital to Denmark which will be affected by the Court's decision on the legal principles involved in the instant case.

By far the greater part of Danish ships are engaged in carrying the goods of other nations to all parts of the world, although to some extent it is also a "shipping", as well as a "carrying" nation. This carrying and shipping industry is very much the largest dollar earner of the so-called "invisibles" which in the past two or three years have barely made up the deficit in Denmark's foreign trade. What might seem a relatively minor extra burden to the United States could be a major disaster to Danish shipping and hence to Denmark's entire economy. A decision which would have the effect of imposing American law and American standards of compensation on Danish shipowners for injuries received by Danish seamen on Danish ships could be gravely deleterious to the economic health, as well as being an unwarranted invasion of the sovereignty, of Denmark.

The Danish Government, while recognizing the need for adjustment and progress in its social legislation to meet the changes and challenges of a dynamic age, is not without pride in its laws, revised in June, 1952, for the protection, care and relief of its seamen and for governing the relations between the seamen and the shipowners.

These laws governing the rights and obligations of Danish shipowners and Danish seamen grew out of the experience, the wisdom, and the social conscience of the Danish people, and reflect their will. Denmark believes, however, that it does not have the right to impose, if it could, its standards upon foreign shipowners in their relations with citizens of the vessel's flag. And the Danish Government is of the opinion, especially since the *Lauritzen* case, that this Court shares that belief with respect to the United States. For Denmark, or any other maritime country, to hold otherwise would practically destroy the "most venerable and universal rule of maritime law"—that questions concerning the internal economy and discipline of a vessel are to be determined by the law of the vessel's

flag. It was therefore greatly reassuring to Denmark, that this Court, in the *Lauritzen* case cited, p. 578:

“the long-needed admonition of Mr. Chief Justice Marshall that ‘an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .’”,

and further said, p. 581:

“But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality.”

POINT II

Comparison of the seven factors of the *Lauritzen* case with those of the instant case compel the conclusion that the choice of law governing the two cases should be the same.

1. *Place of the Wrongful Act.*—

In the *Lauritzen* case, the Danish seaman was injured on board a Danish vessel in a Cuban port. In the instant case, the Spanish seaman was injured on board a Spanish vessel in a United States port. This Court clearly gave little weight to the solution of *lex loci delicti commissi* in cases of shipboard torts, saying at p. 584:

“ . . . the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag.”

The fortuitous place of the accident in the instant case like the fortuitous place of contract in the *Lauritzen* case makes this territorial factor of slight importance in comparison with the law of the flag and all it implies.

2. *Law of the Flag.*—

In the *Lauritzen* case, the Danish seaman was injured on board a Danish vessel and in the instant case a Spanish seaman was injured on board a Spanish vessel. This Court gave cardinal importance to this factor of the Law of the Flag in deciding the *Lauritzen* case and expounded with great care the reasons why. As was pointed out, aside from the historic argument for the application of the law of the flag to all matters concerning the ship's internal affairs and not affecting the rights of third parties, the fact is that "there must be some law on shipboard" and "it cannot change at every change of waters and no experience shows a better rule than that of the state that owns her" (345 U. S. 585). And in *United States v. Flores*, 289 U. S. 158, as quoted in the *Lauritzen* case, this Court said:

"And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . ."

The Court of Appeals for the Second Circuit, in *Taylor v. Atlantic Maritime Co.*, 179 F. 2d 597, cert. den'd 349 U. S. 915, said:

"* * * On the other hand, if the seaman is serving on a foreign ship, and if in addition he has signed articles in a foreign port, obviously there can be no recovery either in tort or in contract, even though, as in *The Paula*, supra, the injury happens on board ship in an American port" (P. 598).

Similarly, in *Gambera v. Bergoty*, 132 F. 2d 414, 415, cert. den'd, 319 U. S. 742, the same court said:

"We decided in *The Paula*, 2 Cir., 91 F. 2d 1001, that a German citizen who had signed the articles in Germany and shipped as a member of the crew of a German ship, could not avail himself of the act. He had chanced to suffer injury while she was in the harbor of New York, a port of call upon a voyage beginning and ending in Germany. The same ruling was made in *The Magdapur*, D. C., 3 F. Supp. 971, and by Judge Goddard in *Plamals v. SS Pinar del Rio*, 1925 Am. Mar. Cas. 1309, affirmed in 2 Cir., 16 F. 2d 984, and affirmed on other grounds in 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827."

The lower court cases, just quoted, are consistent with the Court's discussion on this point in the *Lauritzen* case and their conclusion should be adopted by this Court in the present case. On reason as well as lower court precedent, it is proper and equitable for this Court to refer plaintiff-petitioner to his Spanish remedies.

3. *Allegiance or Domicile of the Injured.*—

In both the *Lauritzen* case and in the instant case, the seaman's nationality and the ship's coincided "without resort to fiction". Applicable to both cases are the words of this Court in the *Lauritzen* case, in saying at p. 587 that the seaman's "presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another".

4. *Allegiance of the Defendant Shipowner.*—

There was no doubt in the *Lauritzen* case that the owner was a Dane by nationality and domicile and there is no doubt that in the instant case the owner is Spanish by nationality and domicile.

5. *Place of Contract.*—

The place of contracting in the *Lauritzen* case was the port of New York and this Court found it to be "fortuitous". In the instant case, the place of contracting was Spain. Again the words of this Court are applicable to the instant case, when it said, pp. 588-9:

"But if contract law is nonetheless to be considered, we face the fact that this contract was explicit that the Danish law and the contract with the Danish union were to control. Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."

6. *Inaccessibility of Foreign Forum.*—

Just as this Court found in the *Lauritzen* case that the seaman was not disadvantaged from being in New York because his claims could be made through the Danish Consulate, so, in the instant case, the District Court found that the seaman could assert his rights by demand upon the Spanish Consul in New York.

7. *The Law of the Forum.*—

The words of this Court in the *Lauritzen* case are conclusive here. At p. 591, the Court said:

"Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."

CONCLUSION

It is respectfully submitted that this Court should affirm the dismissal of the complaint.

**Dated, New York, N. Y.,
January 9, 1958.**

Respectfully submitted,

**LAWRENCE HUNT,
*Counsel for The Government
of Denmark,*
55 Liberty Street,
New York 5, N. Y.**

**DANIEL L. STONEBRIDGE
*Of Counsel.***

SUPREME COURT, U.S.

JAN 15 1958

JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1958

No. ~~2~~ 3

FRANCISCO ROMERO,

Petitioner,

against

**INTERNATIONAL TERMINAL OPERATING CO.,
COMPANIA TRASATLANTICA, also known as
SPANISH LINE, and GARCIA AND DIAZ, INC.
and QUIN LUMBER CO., INC.,**

Respondents.

**BRIEF OF
SKIBSFARTENS ARBEIDSGIVERFORENING
(Norwegian Shipping Federation)**

and

**SVERIGES REDAREFORENING
(Swedish Shipowner's Association)
AS AMICI CURIAE**

**JAMES M. ESTABROOK,
Counsel for Amici Curiae,
80 Broad Street,
New York 4, N. Y.**

**DAVID P. H. WATSON,
of Counsel.**

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Supreme Court of the United States

October Term, 1957

No. 322

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA
TRASATLANTICA, also known as SPANISH LINE, and
GARCIA AND DIAZ, INC. and QUIN LUMBER CO., INC.,
Respondents.

**BRIEF OF
SKIBSFARTENS ARBEIDSGIVERFORENING
(Norwegian Shipping Federation)**

and

**SVERIGES REDAREFORENING
(Swedish Shipowner's Association)
AS AMICI CURIAE**

Having obtained and filed consent of counsel for the petitioner and counsel for the respondents, Skibsfartens Arbeidsgiverforening (Norwegian Shipping Federation) and Sveriges Redareforening (Swedish Shipowner's Association) respectfully submit this brief as *amici curiae*.

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit appears on pages 47 and 48 of the Appendix to the Petition and is reported at 244 F. 2d 409. The petition for writ of certiorari was filed July 29, 1957, and was granted on October 14, 1957. The jurisdiction of this Court is conferred by Title 28 U. S. Code § 1254.

Interest of *Amici Curiae*

Skibsfartens Arbeidsgiverforening (Norwegian Shipping Federation) is an association of Norwegian shipping companies engaged in ocean commerce throughout the world. Its home office is in Oslo, Norway. Its several hundred members operate vessels totalling some 13 million deadweight tons and include practically all the Norwegian companies owning ships trading in foreign commerce.

Sveriges Redareforening (Swedish Shipowner's Association) is an association of Swedish shipping companies engaged in ocean commerce around the globe. Its home office is in Gothenberg, Sweden, and the 190 or so members operate vessels totaling some 4 million deadweight tons.

The members of *amici curiae* are engaged in worldwide foreign international transportation involving calling at many different foreign ports in many different countries. *Amici curiae* urge this Court to consider the practical difficulty of applying the law of each particular port rather than the law of the flag to a seamen's injury claims against the owners of the vessel. This would, *amici* urge, constitute a reversal of the law of the United States as well as being a serious hindrance to international trade.

Amici curiae here are appearing only as to Question 1 as set out on page 2 of petitioner's brief and on the broad question of whether a seaman injured on board ship in connection with the ship's normal operation may maintain an action against the owners of the vessel under the law of the port at which the vessel may happen to be without regard to the rules established by the law of the flag of that vessel.

Amici curiae are not concerned either with the various procedural points involved in this case or with the question of possible liability of International, the stevedores, Quinn Lumber Co., the carpenters, or Garcia & Diaz, the agents. Nor are *amici curiae* concerned with whether the fair value

of necessary hospital care, which was admittedly due Romero, is to be figured only to July 6, 1954 (Appellant's Appendix 107a; Appellee's Appendix 24a-25a).

Statement of the Facts

The petitioner, Francisco Romero, is a citizen and resident of Spain. Romero had signed articles in Spain to serve on board the Spanish s/s Guadalupe for a round trip voyage. The s/s Guadalupe was a motorship, flying the Spanish flag, registered in Spain with Barcelona as its home port and for the purpose of this brief was operated by petitioner, Compania Trasatlantica, also known as Spanish Line. According to the terms of the shipping articles which Romero signed, the terms and conditions of employment were to be controlled by the Spanish Codes of Laws regulating Commerce and Labor, and other regulations in force. The Guadalupe sailed from Spain with Romero on board and after calling at American and Mexican ports returned to Spain. No further articles were signed by Romero, but he continued to sail on board the Guadalupe at the same wages and under the same conditions as heretofore. On the second voyage on May 12, 1954, while the Guadalupe was calling at Hoboken, New Jersey, Romero was injured while assisting in discharging of cargo and baggage. Also engaged on the vessel at this time were stevedores, International Terminal Operating Co., and carpenters, Quin Lumber Co., Inc. From the record it appeared that International was engaged in discharging the cargo and baggage while Quinn Lumber Co., were engaged in doing some carpentry work in connection with the installation of fittings for the prospective carriage of a partial cargo of grain from Hoboken to Spain. Also during the stay at New York Garcia & Diaz, Inc., an American corporation, acted as the ship's agents. Following his accident Romero was hospitalized in Hoboken

where it was found necessary to amputate his left leg. The surgeon who performed the operation was paid by respondent, Spanish Line, and respondent Spanish Line has also acknowledged the responsibility for fair hospital bill. Unfortunately, due to some dispute as to the exact amount of fair hospital bill, this bill has not been paid.

For the record the case came on for trial in the District Court. After a discussion of the jurisdictional points of the case the Court dismissed the action as against Trasatlantica on the grounds that the petitioner had no action under the Jones Act and lacked the necessary diversity of citizenship to otherwise sustain his action on the civil side of the Court. This question of the application of the Jones Act as opposed to the law of the flag appears to be less at issue before this Court than the questions of civil jurisdiction. Sufficient testimony was taken to show that petitioner was a Spanish national and that Trasatlantica was a Spanish corporation and owned and operated the Guadalupe. Absent Jones Act jurisdiction petitioner had no rights at law, because there was no diversity of citizenship between petitioner and Trasatlantica. When petitioner's counsel refused to sever the actions against the three American corporations they were also dismissed because of the joinder of an improper party defendant. Petitioner's counsel refused the suggestion of the District Judge to sever the matter and proceed in admiralty against the Spanish Line.

On appeal the Court of Appeals affirmed. Consequently, one of the issues before this Court is whether the Jones Act conferred civil jurisdiction on the District Court. It is on this point that *amici curiae* urge that it is the law of the flag that should be applied to determine the rights of an injured seaman as against his employer, where the seaman signed articles in his own country, on a ship flying the flag of his own country and later, after the expiration of the articles at a port in his own country, con-

tinned to serve on the vessel. There is no claim anywhere on the record that Romero entered the service of the Guadalupe elsewhere than in Spain. He either signed articles in Spain and was serving pursuant to those articles or in the alternative the articles expired in Spain and he then continued to serve pursuant to some oral agreement reached while the vessel was in a Spanish port.

ARGUMENT

The law of the flag should apply.

As was stated in *J. Lauritzen v. Larsen*, 345 U. S. 571, 583, 73 S. Ct. 921 (1953), the test of location of the wrongful acts or omission, however sufficient for torts ashore, is of limited application to shipboard torts because of the varieties of legal authorities over the waters the vessel may navigate.

This Court has said that perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship by being responsible for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state (*J. Lauritzen v. Larsen*, *supra*, page 584). The petitioner here is urging this Court overrule *U. S. v. Flores*, 289 U. S. 137, 53 S. Ct. 580 (1933).

The Jones Act (Sec. 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, United States Code, § 688) which states,

"That any seaman who shall suffer personal injury in the course of his employment may, at his elec-

tion, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * *

was an amendment of Sec. 20 of the Seamen's Welfare Act of March 4, 1915 (C. 153, 38 Stat. 1164, 1185, Title 46, United States Code, § 688), known as the LaFollette Act. Sec. 20 of this 1915 Act provided as follows prior to amendment:

"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

In this manner, the fellow-servant rule as applicable to seamen was sought to be abolished. But this Court in *Chelentis v. Luckenbach S.S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171 (1918), held that Sec. 20 of the Seamen's Welfare Act of 1915, in attempting to abolish the fellow-servant rule, had imposed no additional liability upon the shipowner beyond the liabilities already existing under the General Maritime Law. This Court, while recognizing the right of the seaman to bring his action in the State Court under the "saving to suitors' clause" held that the seaman, by the abolishment of the fellow-servant rule, was given a right, but lacked the remedy to enforce that right.

Later, this Court, in commenting and passing on the constitutionality of the Jones Act, in *Panama Railroad Company v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924), in an opinion by Mr. Justice Van Devanter, wrote as follows with respect to the amendment of this Sec. 20 of the Act of 1915, at 264 U. S. 389:

"* * * As originally enacted, § 20 was part of an act the declared purpose of which was 'to promote the welfare of American seamen.' It then provided

that in suits to recover damages for personal injuries 'seamen having command shall not be held to be fellow-servants with those under their authority,' and in *Chelentis v. Luckenbach S. S. Co., supra*, p. 384, this Court treated it as part of the maritime law, but held it did not disclose a purpose 'to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore.' After that decision the section was reenacted in the amended form hereinbefore set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.' "

Sec. 33 of the Merchant Marine Act of 1920, therefore, properly takes its place within the framework of the Act to which it was a partial amendment, i.e., the Seamen's Welfare Act of 1915.

The question to be determined is whether the expression "any seaman" as used in the Jones Act was intended to apply to the case of a foreign seaman injured aboard a foreign vessel in a United States port so as to give the foreign seaman a cause of action against his foreign employer without regard to the rules established by the law of the flag of the vessel.

The opinion of this Court in *J. Lauritzen v. Larsen, supra*, makes it quite clear that the expression "any seaman" is not to be taken literally. As stated by Mr. Justice Jackson at 345 U. S. 581:

"Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law."

A further answer is to be found by reference to the wording and context of the Seamen's Welfare Act of 1915. A section by section examination of the Act discloses that certain sections thereof were made specifically applicable to foreign vessels under certain stated conditions. With respect to the balance of the sections, the provisions were couched in terms applicable to United States vessels, but with no extension of their application to foreign vessels.

The Seamen's Welfare Act of March 4, 1915, known as the LaFollette Act, is entitled:

"An Act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea."

The opening section of the 1915 Act amended Section 4516 of the Revised Statutes of the United States with respect to the requirement that a master of a vessel must sign-on, if obtainable, suitable seamen to replace those whose services have been lost by reason of desertion or casualty, and further provides that the master must report such losses to the "United States consul at the first port at which he shall arrive". This opening section is clearly restricted in its application to United States vessels by reason of the reference to United States consuls. It cannot be supposed that foreign vessels in foreign ports should report crew deficiencies to United States consuls located in those foreign ports.

Sec. 2 makes certain provisions for the division of the crew into watches, as well as for distinctions between work on deck and work in the engineroom. It also provides that no unnecessary work shall be done on Sundays or on certain specified holidays. This section, however, is limited in its application to "all merchant vessels of the United States of more than one hundred tons gross, excepting

those navigating rivers, harbors, bays or sounds exclusively * * *." Sec. 2 is clearly inapplicable to other than United States vessels.

Sec. 3 of the Act amended Sec. 4529 of the Revised Statutes of the United States with respect to the time for payment of wages to seamen on coasting voyages, as well as in the case of vessels making foreign voyages. In this section the terminology used is that "the master or owner of any vessel making coasting voyages shall pay to every seaman, * * *," and there is no indication that the section was to apply to foreign seamen serving aboard foreign vessels. The significance of this failure to refer to foreign vessels is pointed up when we examine the provisions of Sec. 4 and especially Sec. 11 of the Act. It might also be pointed out that foreign vessels are not eligible to engage in coastwise trade. Title 46 U. S. Code, Section 883.

Sec. 4 of the Act amended Sec. 4530 of the Revised Statutes of the United States with respect to the right of a seaman to receive on demand from the master of the vessel one-half the wages earned to that point at every port where such vessel loads or delivers cargo before the end of the voyage. The opening language of Sec. 4 states that "every seaman on a vessel of the United States shall be entitled to receive on demand * * *" and then outlines his rights. The closing portion of Sec. 4 reads as follows:

"And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This Sec. 4 therefore, stands out in relation to the three sections previously considered, in that Congress considered it necessary to include this specific provision in order to extend its terms to foreign vessels while in United States ports.

The terms of this Sec. 4 were fully considered by this Court in the case of *Strathearn S.S. Co. v. Dillon*, 252 U. S.

348, 40 S. Ct. 350, 64 L. Ed. 607 (1919), wherein Mr. Justice Day, in a unanimous opinion, held that the terms of the section were applicable to a British subject serving aboard a British vessel while that vessel was in a port of the United States. The fact that certain contracts which ran counter to the purposes of the statute were voided, did not render Sec. 4 of the statute unconstitutional as destructive of contract rights. Mr. Justice Day held that this Court had fully considered the matter in *Patterson v. Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1903), and that there was no doubt as to the authority of Congress to pass a statute of this sort specifically applicable to foreign vessels in our ports.

Here all of Romero's earned wages were paid. The claimed cause of action for wages refers only to unearned wages accruing after the date of the accident (R. 201a). Such unearned wages have never been included under this Act. *Page v. U. S. A.*, 177 F. 2d 601 (C. A. 9, 1949); *Yoffe v. Calmar S.S. Corp.*, 23 F. Supp. 629 (D. C. N. D. Cal. 1938); *Underwood v. Isbrandtsen*, 100 F. Supp. 863 (D. C. S. D. N. Y. 1951).

Sec. 5 of the Act of 1915 amended Sec. 4559 of the Revised Statutes of the United States with respect to provisions for the handling of complaints by the officers or crew of a vessel while in a foreign port when the vessel was alleged to be in an unsuitable condition to go to sea. The wording of this section is that "upon a complaint in writing signed by the first and second officers or a majority of the crew of any vessel, while in a foreign port, . . . the consul or a commercial agent who may discharge any of the duties of a consul shall cause to be appointed" certain persons to examine into the cause of the complaint. In this section the expression "any vessel" is used, but there are no additional provisions extending the terms of the section to foreign vessels. In fact, it would be hard to imagine that Congress could have intended to regulate

the actions of foreign consuls or to have foreign seamen serving aboard foreign vessels present their complaints and problems to a United States consul in a foreign port for correction of the alleged deficiencies. Such an exercise of power by a United States consul in a foreign port with respect to a foreign vessel and foreign seamen would be totally out of line with basic theories of international jurisdiction.

Sec. 6 of the Act of 1915 amended Sec. 2 of the Act of March 3, 1897, as to the provisions for crew space and sanitary conditions aboard "all merchant vessels of the United States". This section was clearly not intended to apply to other than merchant vessels of the United States.

Sec. 7 of the Act of 1915 amended Sec. 4596 of the Revised Statutes of the United States and specified punishments for certain offenses as to "any seaman who has been lawfully engaged or any apprentice to the sea service." Here again, as to the terms "any seaman", there is no specific provision making the section applicable to foreign seamen serving aboard foreign vessels such as were found in Sec. 4, or will be found later in Sec. 11.

Sec. 8 of the Act of 1915, amended Sec. 4600 of the Revised Statutes of the United States and provided that "it shall be the duty of all consular officers to discountenance insubordination by every means in their power and, where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." The expression "all consular officers" in Sec. 8 is as general as the expression "any seaman" found in Sec. 7 and later in Sec. 11, but here again it is clear that it was the intent of Congress that "all consular officers" meant only consular officers of the United States. As stated by this Court in *Sandberg v. McDonald*, 248 U. S. 185, 39 S. Ct. 84, 63 L. Ed. 300 (1918), at 248 U. S. 195:

“Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.”

Sec. 9 of the Act of 1915, amended Sec. 4611 of the Revised Statutes of the United States with respect to flogging and corporal punishment “on board of any vessel”. No specific application to foreign seamen aboard foreign vessels is to be found in this section. The significance of the failure to extend its application is pointed up by referring to those sections where such an extension was made.

Sec. 10 of the Act of 1915, amended Sec. 23 of the Act entitled “An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce”, approved December 21, 1898, 30 Stat. 755, 763, with respect to the daily requirements of water and butter. Here again, no attempt was made by the language of the section to extend its application to other than United States vessels or American Seamen.

In Sec. 11 of the Seamen’s Act of 1915 we find a repetition of the situation existing in Sec. 4 of that same Act. The provisions are specifically extended to foreign vessels while in waters of the United States. Sec. 11 amended Sec. 24 of the Act entitled “An Act to amend the laws relating to American seamen for the protection of such seamen and to promote commerce”, approved December 21, 1898. Sec. 24 of that Act of 1898 was, in turn, an amendment of Sec. 10 of Chapter 121 of the laws of 1884, 23 Stat. 53, as in turn amended by Sec. 3 of Chapter 421 of the laws of 1886, 24 Stat. 79. Sec. 11 of the Act of 1915 amended all these prior statutes as to the prohibition against paying “any seaman” wages in advance of the time when he had actually earned the same. Sub-section (e) of this Sec. 11 of the Act of 1915 reads as follows:

“That this section shall apply as well to foreign vessels while in waters of the United States, as to ves-

sels of the United States, and any master, owner, consignee or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation."

Sub-section (a) of this section used the words "that it shall be and is hereby made unlawful in any case to pay any seaman wages in advance * * *." Yet, in spite of the use of the words "any seaman" Congress deemed it necessary to add sub-section (e) in order to extend the terms of this section to apply as well to foreign vessels in the waters of the United States. In other words, Congress did not believe that the use of the expression "any seaman" was in and of itself sufficient to require application to foreign vessels, even if those vessels were in ports of the United States. This Court concurred in that belief, for in *J. Lauritzen v. Larsen*, *supra*, the Court held that the words "any seaman" were not to be literally applied.

This situation finds an immediate parallel in the wording of the Jones Act which was, of course, an amendment of Sec. 20 of this same Seamen's Welfare Act of 1915. The opening language of the Jones Act reads, "That any seaman who shall suffer personal injury in the course of his employment may * * *." But there is no provisions contained in Sec. 20, as amended, applying that section to foreign vessels under any circumstances whatsoever.

○ If Congress had intended that the Jones Act should apply to injuries sustained by foreign seamen aboard a foreign vessel in a port of the United States, the necessary language was at hand for them specifically so to provide. It is significant that Congress added no such provisions.

In *Patterson v. Bark Eudora*, *supra*, this Court considered the effect of Sec. 24 of the Act of December 21, 1898, 30 Stat. 755, 763, to which Sec. 11 of the Seamen's Act of 1915 was an amendment, as described above. This Sec. 24 of the Act of December 21, 1898, similarly made

it unlawful in any case to pay "any seaman" wages in advance of the time when he had actually earned same. It further stated that the provisions of the section were to be applicable as well to foreign vessels as to vessels of the United States.

The case involved primarily a question of the power of Congress to enact such a provision applicable to foreign vessels. In the words of Mr. Justice Brewer, at 190 U. S. 173:

"But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the Fourteenth Amendment to the Federal Constitution * * *."

The Court held that the provision making this section of the Act specifically applicable to foreign vessels was constitutional and within the domain of Congress under the commerce clause of the Constitution.

Later, this Court considered the interpretation of this Sec. 11 of the Act of 1915 in *Sandberg v. McDonald*, 248 U. S. 185, 39 S. Ct. 84, 63 L. Ed. 300 (1918). This Court held that the provisions of Sec. 11 did not apply to advancements made in foreign ports to alien seamen shipping abroad on foreign vessels, pursuant to contracts valid under the foreign law, in the following language at 248 U. S. 195:

"Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication."

And later at page 196:

"In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the

provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress."

For the reasons discussed above with respect to *Patterson v. Bark Eudora*, *supra*, the *Sandberg* case is equally undeterminative of the extent of the application of the Jones Act, since the *Sandberg* case also involved the interpretation of a section of the statute specifically extended to foreign vessels. It must be noted, however, that in spite of Congress' intent to make Sec. 11 applicable to foreign vessels while in waters of the United States, this Court held that the doctrine was not to be extended beyond the territorial limits of the United States both by reason of the statute and for reasons of common sense.

How then can we justify the application of the Jones Act to an injury to an alien seaman aboard a foreign vessel when the wording of the Jones Act contains no provision making it applicable to foreign seamen serving aboard foreign vessels under any conditions whatsoever?

Sec. 12 of the Act of 1915 repealed Sec. 4536 of the Revised Statutes of the United States and provided that no wages due or accruing to "any seaman" or apprentice should be subject to attachment or arrestment. Note that Sec. 12, as does Sec. 11, uses the expression "any seaman" and yet Sec. 12 contains no specific extension to foreign vessels. If a specific extension was required in Sec. 11 after the use of the expression "any seaman", then such a specific extension would equally be necessary as applied to the same expression when used in Sec. 12.

Sec. 13 of the Act of 1915 establishes certain requirements as to the number of the deck crew who are required

to have a rating of not less than A.B. and requires 75% of the crew of each department to understand any order given by the officer of such vessel. The language of this section is in the form of a prohibition, reading "that no vessel of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in Sec. 1 of this Act, shall be permitted to depart from any port of the United States unless she has on board * * *." Here again, no specific extension is made as to foreign seamen or foreign vessels, and, in fact, the subsequent language in Section 13 which provides that,

"Graduates of school ships approved by and conducted under rules prescribed by the Secretary of Commerce may be rated able seamen after twelve months service at sea * * *",

indicate that this section of the Act was not intended to apply to other than American vessels, since Congress certainly did not intend that all foreign seamen were to apply for licenses and certificates from the United States Department of Commerce before being qualified to ship aboard foreign vessels. This failure to provide for foreign vessels is pointed up by reference to the following section of the Act, i.e., Sec. 14, where we find a specific application to foreign vessels leaving ports of the United States.

Sec. 14 of the Act of 1915 amended Sec. 4488 of the Revised Statutes by adding thereto specific regulations as to life saving appliances, the minimum number of davits and open boats, and, among other things, for a minimum number of certified lifeboat men. This section contains the following language:

"Provided, that foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life saving appliances, their equipment, and the manning of same."

Here again, as was found in Sec. 4 and Sec. 11 of the Act of 1915, there is a specific provision as to the extension of the section to foreign vessels under certain stated conditions. It becomes increasingly obvious, therefore, that Congress was well aware of the fact that certain of these sections were to be applied to foreign vessels, whereas certain of them were not. Where language is found making specific reference to the application of a section to foreign vessels, then it must be concluded that such was the intent of Congress, and conversely, it must be concluded that, as to those sections where such a specific extension is omitted, it was the intent of Congress that no such extension be made. If that were not the case, then such wording would be mere surplusage and of no effect whatsoever.

Section 15 of the Act of 1915 provides that: "the owner, agent, or master of every barge which, while in tow through the open sea has sustained or caused any accident, shall be subject, in all respects to the provisions of Sections ten, eleven, twelve and thirteen of chapter three hundred and forty-four of the Statutes at Large, approved June twentieth, eighteen hundred and seventy-four," and further provided that the reports prescribed in those sections shall be transmitted by collectors of customs to the Secretary of Commerce, who shall, in turn, transmit them in summary form to Congress annually. Here again, no specific provision is made applying the terms of this section to foreign vessels, and we should bear in mind that if such had been the intention of Congress, then the language was readily available, for, as has been noted above, such language had already been used three times in the same Act.

Sec. 16 of the Act of 1915 "requested and directed" the President to give notice to the several governments that all treaties and conventions between the United States and such governments with respect to the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in

foreign ports and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States be terminated upon the expiration of certain specified periods. This request was also directed to "any other treaty provision in conflict with the provisions of this Act."

The Congressional Record bears witness to the prolonged discussion and debate which the provisions of this particular section evoked. On the one hand, Senator LaFollette of Wisconsin was urging upon Congress the desirability of the termination of such treaties, whereas Senator Burton of Ohio was the leader of the faction which urged a more moderate course. In the end, Senator LaFollette had his way, for Sec. 16 as finally enacted did call for the termination of such treaties. (Congressional Record, 63rd Congress, 1st Session, Vol. 50, Part 6, pages 5761-5792).

It is interesting to note that in spite of the urging of Senator LaFollette, from whom the Act of 1915 derives its name, the provisions of that Act were not made uniformly applicable to foreign vessels, but only certain sections thereof, and then only under certain specified conditions and situations.

Evidence of the reluctance in certain quarters of Congress to make even these specified sections applicable to foreign vessels is to be found in the Report of the House Committee on Merchant Marine and Fisheries. In commenting and passing on the proposed Sec. 4 of the Act dealing with half wages the Report states (House Report No. 851, 63rd Congress, 2nd Session, page 18):

"The application of this section, however, to foreign vessels raises a serious question."

And later at page 20 of the same Report:

"It should be stated that the Committee are not unanimous in making this provision apply to foreign ships."

Some members of the Committee doubt our right and the wisdom of making it apply to foreign ships and question its value to our merchant marine."

Sec. 17 of the Act of 1915 provided for the repeal of the various treaties designated in Sec. 16 upon the termination of the periods of notice required.

Sec. 18 of the Act of 1915 provided as to the time the Act was to take effect.

Sec. 19 of the Act of 1915 amended Sec. 16 of the Act of December 21, 1898, entitled "An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce," by adding thereto a provision that if "any seaman" incapacitated from service by injury or illness was on board a vessel so situated that a prompt discharge requiring the personal appearance of the master of the vessel "before an American consul or consular agent was impracticable," then such seaman himself was to be sent to a consul or consular agent who was in turn directed to care for him and defray the cost of his maintenance and transportation. Here again, although the section of the Act uses the expression "any seaman", it is obvious that it refers to seamen aboard American vessels, for it refers specifically to the requirement of a personal appearance of the master of the vessel before an "American consul or consular agent".

The next and last section, Sec. 20 of the Act of 1915, was the section which sought to abolish the fellow-servant doctrine as applied to seamen, and which was superseded and amended by the passage of the Jones Act in 1920.

If we consider the Jones Act within the framework of the Merchant Marine Act of June 5, 1920, of which it was Sec. 33, we are forced to the same conclusion that the expression "any seaman" was not intended to cover foreign seamen serving on foreign vessels.

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The Merchant Marine Act of June 5, 1920, as has been pointed out above, was "An Act To provide for the promotion and maintenance of the American Merchant Marine . . . " and as such its provisions and sections covered the following subjects: the repeal of prior legislation with respect to appropriations for the Military and Naval establishments; the repeal of prior legislation with respect to charter and freight rates and to the requisitioning of vessels by the Government; the establishment of the United States Shipping Board; authorization for the sale or charter of Government-owned vessels to citizens of the United States; further authorization with respect to the sale of other property by the United States Shipping Board; provisions for the investigatory powers of the United States Shipping Board with respect to the operation of vessels by citizens of the United States; provisions for the carrying of all mails of the United States on American-built vessels documented under the laws of the United States if practicable; provisions for a limitation of the number of passengers to be carried aboard cargo vessels documented under the laws and flag of the United States; provisions stating that no merchandise shall be transported between points in the United States on other than vessels built in and documented under the laws of the United States and owned by persons who are citizens of the United States; all the provisions of the Ship Mortgage Act of 1920; a further amendment of the prohibition against the payment of advance wages, earlier mentioned, not amending, however, the specific provisions as to the applicability to foreign vessels within the harbors of the United States; and finally, the establishment of certain definitions as to the ownership of vessels by citizens of the United States.

In short, there is nothing in the Merchant Marine Act, of June 5, 1920, calling for any application whatsoever to foreign seamen serving aboard foreign vessels except for

the specific reference to foreign vessels in the amendment to the prohibition against advance wages. The balance of the Act is concerned with the machinery necessary for the establishment and operation of the United States Shipping Board and the operation, supervision, sale and purchase of vessels of the United States.

The report of the Senate Committee on Commerce made the following statement with respect to the aims of the Merchant Marine Act of 1920 (Senate Report No. 573, 66th Congress, 2nd Session, p. 2):

"No interests but American interests have been kept in view. We are sure that other nations will look after their citizens and their needs, and if our business is to be cared for, we must do it."

If we look to the wording of the Jones Act, totally aside from its context within the framework of the Acts of 1915 or 1920, further evidence is found that Congress did not intend to include within its provisions foreign seamen serving aboard foreign vessels injured in our ports. The closing sentence of Sec. 33 of the Merchant Marine Act of 1920 reads as follows:

" . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The use of the word "jurisdiction" has been interpreted by this Court not to relate to the general jurisdiction of the court, but to venue only. *Panama Railroad Company v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924). Even granting such an interpretation of the word "jurisdiction", however, this closing sentence of Sec. 33 makes it abundantly clear that Congress had in mind domestic employers and shipowners rather than foreign shipowners when it adopted this particular phraseology.

How would a foreign seaman proceed under the language of the Jones Act if his employer, the foreign shipowner, did not live in the United States and did not have his principal office located in the United States?

There may be isolated instances in which the defendant employer of the foreign seaman, while having his principal office located in the foreign country, may at the same time have an office in this country so as to allow the injured foreign seaman to start an action under the Jones Act in the court of the district in which such local office is located. But if we are to impute to Congress the intent to provide for foreign seamen serving aboard foreign ships under the terms of the Jones Act in spite of its language, then we must equally be prepared to admit that by the section as presently written, Congress has given only a partial remedy, since the majority of foreign seamen would find it impossible to comply with the jurisdiction and venue requirements as presently constituted.

If Congress had intended to give a remedy to the foreign seaman serving aboard a foreign vessel under the Jones Act, it could very easily have so provided by giving him an *in rem* remedy. With such a remedy available, the foreign seaman could have proceeded against the vessel upon her arrival in any United States port. It is significant that Congress did not make any such provision. A lien against the vessel is essential to every proceeding *in rem*, and no such lien arises by reason of the Jones Act in favor of an injured seaman. This Court specifically so held in *Plamals v. s/s Pinar Del Rio*, 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827 (1928).

It has been argued by petitioner that the Jones Act should be applied to foreign seamen serving on foreign ships in order to close the gap alleged to exist between the operating costs of foreign and American shipowners. This argument is apparently based on a belief that such a con-

struction would indirectly subsidize the American Merchant Marine, and that as a result the burden falling upon the United States taxpayer would be lightened.

Petitioner ignores our national policy against indirect subsidies to shipping as shown by the Merchant Marine Act of June 29, 1936 (C. 858, 49 Stat. 1985, 46 U. S. C. § 1101), and the Congressional Reports.

Prior to the passage of the Merchant Marine Act of 1936, Congress had provided aid to American shipping in the form of lending money at low rates of interest to the American shipping companies for the purpose of building new ships for foreign trade. Congress had, in addition, appropriated large annual sums under the guise of payments for ocean-mail contracts. Petitioner now seeks to have the court construe the Jones Act as applying to foreign seamen in order to give American shipowners an additional subsidy. However, President Roosevelt, in his Message to Congress on the Merchant Marine Act of 1936, dated March 4, 1935, in speaking of the difference between the ocean-mail payments actually made and the reasonable cost of such service, stated (74th Congress, House Document No. 118, p. 2):

"The difference, \$27,000,000, is a subsidy, and nothing but a subsidy. But given under this disguised form it is an unsatisfactory and not an honest way of providing the aid that Government ought to give to shipping.

I propose that we end this subterfuge. If the Congress decides that it will maintain a reasonably adequate American Merchant Marine I believe that it can well afford honestly to call a subsidy by its right name." (Emphasis supplied.)

More recent evidence of the policy of our government to avoid the indirect subsidy is found in President Truman's request made in August, 1952, to the Secretaries of Commerce and the Treasury to prepare reports on the existing

law offering tax deferments on shipping earnings as an added inducement to the setting aside of funds for new construction. President Truman asked for a plan to abrogate these tax benefits and establish some other financial assistance in the form of a direct subsidy.

It is submitted, that for the courts of the United States to attempt to reduce the burden of the United States taxpayer by subjecting foreign shipowners to higher insurance rates for personal injury coverage would be to resort to that very form of "subterfuge" which the Merchant Marine Act of 1936 was explicitly designed to avoid. The decisions of our courts have no place within this province.

According to present policy, foreign as well as United States vessels are subject to regulation by multilateral Conventions or treaties, rather than by unilateral legislation. The most recent example was the International Convention for Safety of Life at Sea, 1948, held in London. This Convention was signed in London on June 10, 1948, by the respective plenipotentiaries of the government of the United States and the governments of 27 other countries. The provisions of the Convention were submitted to the Senate on January 13, 1949, and were ratified without amendment or exception on April 20, 1949 (Congressional Record, 81st Congress, 1st Session, Vol. 95, Part 4, pages 4822-4825). Subsequently, on November 19, 1951, the fifteenth country deposited its ratification, and the Convention thereby came into force on November 19, 1952. President Truman, by proclamation dated September 10, 1952, proclaimed that the Convention was to be observed and fulfilled with good faith by the United States on and after November 19, 1952. The Convention was ratified by Spain on March 26, 1953.

This Convention provides, in brief, for all vessels to obtain from their own countries certificates of compliance with the requirements of the Convention with respect to:

life saving equipment, watertight bulkheads, double bottoms, load lines, stability tests, log entries, safety of electrical installations, fire protection and patrols, radio installations and the carriage of dangerous cargoes. Also promulgated were uniform regulations for preventing collisions at sea.

According to petitioner's principles of statutory construction, the same result should have been reached by extending American inspection statutes to cover all ships trading to the United States. That Congress and the President acted through the Convention is proof positive of our policy to steer clear of applying United States statute law to foreign vessels, but to accomplish the same aims through multilateral action calling for consent by all concerned.

Counsel for petitioner has stressed the alleged inequality existing between American and foreign seamen, and urges that the Jones Act should be applied since it is more liberal to the seamen.

Those are not valid arguments for applying the Jones Act to the factual situation here. This Court in *J. Lauritzen v. Larsen* at 345 U. S. 593 stated that such arguments were "brash" and "misaddressed". The real question is whether the Jones Act was by its terms intended to be applicable to a foreign seaman who is injured on a foreign ship in an American port after signing on a foreign vessel in a foreign port when that seaman admittedly has benefits to which he is entitled under the law of the flag.

Petitioner here is seeking furthermore to have this Court reconstrue the Jones Act. The Jones Act was enacted to give a seaman recovery for negligence. Prior to the Jones Act the seamen had no cause of action for negligence but only for unseaworthiness. *The Osceola*, 189 U. S. 158, 23 S. Ct. 483 (1903).

We submit that counsel for the petitioners is in error when he says that passage of Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act, was "superfluous" with respect to the rights of American seamen. The fact is that absent that section American seamen would have no cause of action for negligence at all. Nor do we follow petitioner's argument that passage of the Jones Act on May 4, 1920 was the natural outgrowth of the decision of this Court in *Strathearn S.S. Co. v. Dillon*, *supra*, handed down 37 days earlier. The wage statute (Section 4 of Seamen's Welfare Act of 1915), discussed in the *Strathearn* case was by its terms made specifically applicable to foreign seamen on foreign ships while in harbors of the United States. The decision of this Court upheld its constitutionality. If there was causal relationship between the *Strathearn* case and the Jones Act, and if it was the intent of Congress in enacting the Jones Act to make it applicable to foreign seamen on foreign ships, we wonder why specific language was not included in the Jones Act similar to that to be found in the wage statute. The Jones Act was enacted on May 4, 1920 to fill a gap caused by the fact that this Court in *Chelentis v. Luckenbach Steamship Co.*, *supra*, has held that Section 20 of the Seamen's Welfare Act of 1915 imposed no additional liability upon shipowners beyond those already existing under the General Maritime Law for unseaworthiness. The Jones Act amended that Section 20 so as to provide a remedy, which this Court had held did not previously exist. Petitioner's claim that passage of the Jones Act in 1920 added nothing to the rights of American seamen is wholly unsupported either by statute or authorities. All American seamen in our practice seeking negligence recoveries from their employees now sue under Section 33 of the Merchant Marine Act of 1920 and not under Section 15 of the Seamen's Welfare Act of 1915.

The intent of Congress in enacting the Jones Act in 1920 after the *Strathearn* decision was clearly to extend the

rights of American seamen; had foreign seamen been in the minds of Congress the Jones Act, like Section 15 of the Seamen's Welfare Act of 1915, would have specifically referred to foreign vessels.

Furthermore, under the Jones Act American seamen are granted recovery for injuries even though the vessel may have been in a foreign port at the time. *Farrell v. U. S.*, 167 F. 2d 781 (2 C. A.), affirmed 336 U. S. 511, 69 S. Ct. 707 (1949) (injury ashore in Sicily); *Cain v. Alpha S.S. Corp.*, 35 F. 2d 717 (2 C. A.), affirmed 281 U. S. 642, 50 S. Ct. 443 (1930) (assault aboard vessel in Venezuelan port); *Wheeler v. West India S.S. Co.*, 103 F. Supp. 631 (S. D. N. Y.), affirmed 205 F. 2d 354 (2 C. A.), cert. den. 346 U. S. 889, 74 S. Ct. 141 (1953) (injury ashore in France) *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391 (1924) (injury aboard vessel on an inland river in Ecuador).

Petitioner here would seek to reverse these holdings and leave American seamen to the benefits afforded by the law of the port, not the law of the flag. Such a restriction of the rights of American seamen is obviously foreign to the intent of Congress. If we are to hold that statutes such as the Jones Act are to be applied to foreign seamen aboard foreign vessels while in our ports it is only reasonable to expect that other nations may in turn enforce their own local statutes to events occurring aboard American flag vessels while in their ports. International commerce is a two-way street. Mr. Justice Jackson was well aware of the danger of such retaliation when he wrote in *J. Lauritzen v. Larsen* at 345 U. S. 582:

"But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

Having examined the wording of the Jones Act, both within the framework of the Seamen's Welfare Act of 1915, to which it was an amendment, and within the framework of the Merchant Marine Act of 1920, in which it was enacted, we can see that this Court was on firm ground when, in *J. Lauritzen v. Larsen, supra*, it held that the words "any seaman" in the Jones Act were far from all inclusive and that the Jones Act was to be applied to "foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law". 345 U. S. 581. The provisions of the Acts indicate that when Congress intended any particular section to apply to other than United States vessels, a specific provision was invariably included. As a result no guesswork is required to determine what sections of the Acts are limited to United States vessels and what sections of the Acts are to be further extended so as to apply as well to foreign vessels under specified conditions.

Sec. 11 of the Act of 1915 which prohibited the payment of advance wages also used the expression "any seaman" in defining its applicability, but Congress did not feel that that alone was sufficient to extend to other than United States vessels, because sub-section (e) of that Sec. 11 called for specific application "to foreign vessels while in waters of the United States." If Congress had intended the Jones Act to apply as well to foreign vessels, then why was such a specific extension not included within its terms?

As stated by this Court in *Sandberg v. MacDonald*, at 248 U. S. 195, with respect to application of Sec. 11 to foreign vessels while in other than United States ports:

"Had Congress intended to make void such contracts and payments, a few words would have stated that intention, not leaving such an important regulation to be gathered from implication."

CONCLUSION

Wherefore, petitioners respectfully urge that insofar as the application of the Jones Act is concerned that this Court affirm the dismissal of the complaint as to the Spanish Line under the terms that petitioner's rights are to be determined by the law of the flag.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Amici Curiae,
80 Broad Street,
New York 4, N. Y.

DAVID P. H. WATSON,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 3

FRANCISCO ROMERO,

against

Petitioner,

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA; also known as SPANISH
LINE, GARCIA & DIAZ, INC., and QUIN LUMBER CO.,
INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

NARCISO PUENTE, JR.,
Counsel for Petitioner,
70 Pine Street,
New York 5, N. Y.

Of Counsel:

SILAS B. AXTELL,
15 Moore Street,
New York 4, N. Y.

CHARLES A. ELLIS,
37 Wall Street,
New York 5, N. Y.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRAS-
ATLANTICA, also known as SPANISH LINE, GARCIA & DIAZ,
INC., and QUIN LUMBER CO., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

Petitioner, Francisco Romero, a disabled seaman, respectfully petitions for rehearing in the above entitled matter.

Statement

Petitioner, a Spanish seaman and member of the crew of the Spanish SS Guadalupe, was tragically injured on board the vessel while it was tied up at Pier No. 2, Hoboken, New Jersey, on May 12, 1954. His injury was due to the unseaworthiness of the vessel and the combined negligence of a miscellany of crewmen and American employees

and agents of three American corporations, including a stevedoring company, a carpentering company, and the agent of the Spanish line.

On motion to dismiss for lack of jurisdiction of the subject matter, the District Court (Hon. Sidney Sugarman, D. J.) conducted a pre-trial jurisdictional hearing and dismissed the complaint with an opinion reported in 142 F. Supp. 570 and 1956 A. M. C. 1579. On appeal, the Court of Appeals affirmed with a *per curiam* opinion reported in 244 F. 2d 409.

This Court granted certiorari, 355 U. S. 807. The case was argued during the last Term and restored to the calendar for reargument, 356 U. S. 955.

On February 24, 1959, the Court rendered its decision vacating the judgment and remanding the case for trial as to the three American corporate defendants, but affirming dismissal as to Compania Trasatlantica, as a dismissal on the merits.

The Court divided 5-4 on the question of jurisdiction of an action based on maritime law under 28 U. S. C. § 1331, the majority holding jurisdiction did not exist under that section; but sustained jurisdiction against Compania Trasatlantica under the Jones Act and "pendent" jurisdiction of the maritime law claims against that respondent, and sustained jurisdiction against the three American corporations by reason of diversity under 28 U. S. C. § 1332. But the Court held, 7-2, that the complaint was properly dismissed as to Compania Trasatlantica, treating the dismissal as on the merits.

In affirming the dismissal on the merits as to Compania Trasatlantica, the majority held the case was controlled by *Lauritzen v. Larsen*, 345 U. S. 571, where the injury was sustained by a seaman on a Danish vessel in Cuban waters and the action was only against the Danish shipowner for negligence.

Grounds for Rehearing

FIRST: With comparatively little discussion, the Court sustained jurisdiction of the subject matter of the Jones Act claim against Compania Trasatlantica. Mr. Justice Frankfurter stated at page 4 of the opinion:

"Petitioner asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights."

It sustained "pendent" jurisdiction of the maritime law claims also pleaded against that defendant; and sustained diversity jurisdiction under 28 U. S. C. § 1332 of the subject matter of all maritime law claims against the three American corporations.

Hence, it became completely immaterial whether jurisdiction of any of the maritime law claims did or did not exist also under 28 U. S. C. § 1331, and unnecessary, therefore, to decide that question in this case, and more especially by opinions evidencing that on present arguments the Court is divided 5-4 on that question.

The Court unfortunately gave most of its research and attention to the making of a 5-4 decision of the question of whether jurisdiction of maritime law claims exists under 28 U. S. C. § 1331.

But it is most important nationally that this decision, undertaking by 5-4 vote to settle this question for future cases, rather than for its having any effect whatsoever in the case at bar, should not be rested on an unsupported and erroneous premise and conclusions drawn therefrom at variance with and which must overturn fundamental principles respecting the judicial power and jurisdiction early established and hitherto adhered to by this Court.

By a footnote in the majority opinion (footnote 23, p. 13), Mr. Justice Frankfurter, without citation of any supporting authority, states erroneously, as follows, what in reality is the sole premise of subdivision "(b)" of part "I" of the majority opinion:

"All suits involving maritime *claims*, regardless of the *remedy* sought, are *cases* of admiralty and maritime jurisdiction within the meaning of Article III, whether they are asserted in the federal courts or under the saving clause, in the state courts. Romero's *claims* for damages under the general maritime law are a *case* of admiralty and maritime jurisdiction." (Italics ours.)

From this, Mr. Justice Frankfurter repeatedly charges throughout part "I (b)" that *petitioner* proposes a "design of changing the method" and "demands for a change in the time-sanctioned mode" and "drastic innovation . . . in admiralty procedure" (p. 14); a "revolutionary procedural change" (p. 15); "drastic change", "far reaching dislocating construction" (p. 16); "a most far reaching change . . . made subterraneously" for "the infusion of general maritime jurisdiction into the Act of 1875" involving "a disruptive effect on the traditional allocation of power over maritime affairs in our federal system" (p. 17); a "disruption of principle" and "subversion of a principle" which will "eviscerate the postulates of the saving clause" (p. 18); "To give a novel sweep to the Act" (p. 20); "An infusion of general maritime jurisdiction into the 'federal question' grant" (p. 21); "this proposed modification of maritime jurisdiction" (p. 22); "this novel view of the statute" (p. 23); "the effort to infuse general maritime jurisdiction into the Act of 1875", "to extend to cases of admiralty and maritime jurisdiction" "to reconstruct the Act to include cases of admiralty and maritime jurisdiction" (p. 24); "to expand the jurisdiction of the federal courts", "the expansion is proposed, for the first

time" (p. 25); "the proposed infusion of general maritime jurisdiction into the Act of 1875" and "to overturn the existing maritime system" (p. 26).

In footnote 23, page 13, Mr. Justice Frankfurter uses—and well he might—the symbol "Cf." in citing 2 Story, Commentaries on the Constitution of the United States, § 1672. For in § 1672, page 504, footnote 2, speaking of those cases in which a concurrent jurisdiction exists under the saving clause, Judge Story states:

"This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction, than cases of common law jurisdiction."

In the celebrated speech of Mr. Chief Justice Marshall, delivered in the House of Representatives, on the resolutions relative to Thomas Nash, charged with murder committed on a British vessel on the high seas and demanded by that Government under extradition treaty, the distinction between "cases" specified in the Constitution and "questions" specified in the resolutions against which the Chief Justice spoke, it is stated as follows:

"The gentleman from New York had relied on the second section of the third article of the constitution, which enumerates the cases to which the judicial power of the United States extends, as expressly including that now under consideration. Before he examined that section, it would not be improper, to notice *a very material misstatement of it, made in the resolutions* offered by the gentleman from New York. By the constitution, the judicial power of the United States is extended to all *cases* in law and equity, arising under the constitution, laws and treaties of the United States; but the resolutions declare the judicial power to extend to all *questions* arising under the constitution, treaties and laws of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law

or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision.

"But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction, must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States." (Appendix, 5 Wheat. (15 U. S.) 1, 16, 18.)

This speech is cited, and this same distinction made, in 2 Story's Commentaries on the Constitution, § 1646, pages 485-486. And § 1762, page 570, makes the distinction between "appeal" allowed "in cases of equity and admiralty jurisdiction", in which review was of both facts and law, and a "writ of error" applicable "in suits at common law", and which "removes nothing for reexamination but the law." See also, *The Sarah*, 8 Wheat. (21 U. S.) 391, 395.

In *The Hine v. Trevor*, 4 Wall. (71 U. S.) 555, 569 (1866), this Court states as clearly established that:

"2. The original jurisdiction in admiralty exercised by the District Courts, by virtue of the act of 1789, is *exclusive*, not only of other Federal courts, *but of the state courts also.*" (Italics ours.)

From this we submit that it clearly follows that the true "postulate of the saving clause" is a distinction between "cases of admiralty and maritime jurisdiction" according to whether they are such as must be or properly have been asserted in admiralty, and cases which, though based on claims under the maritime law, are not asserted in admiralty but are properly asserted as cases at law, either on the law side of the Federal courts or in the state courts.

In *Leon v. Galceran*, 11 Wall. (78 U. S.) 185, 191, this Court said:

“the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property.”

When, however, the common law, in its equal competency, gives the remedy which is employed, it is then a case of common law jurisdiction and not a case of admiralty and maritime jurisdiction. Only when the case is either one which must be brought in admiralty or one which, though it might have been brought at law, actually has been brought in admiralty, is it a case of admiralty and maritime jurisdiction. To hold otherwise, as in footnote 23 of Mr. Justice Frankfurter's majority opinion, is to confuse “cases” with “questions” or claims, just as emphasized in the speech of Mr. Chief Justice Marshall above quoted from, and as emphasized by the Chief Justice also in *Osborne v. United States Bank*, 9 Wheat. (22 U. S.) 738, 819. And we respectfully submit that Mr. Justice Frankfurter's footnote 23 is itself an erroneous postulate which, if accepted, will “eviscerate the postulates of the saving clause”, as heretofore expounded in this Court, by subterraneously substituting a novel postulate, with disruptive effect on the traditional allocation of power over maritime affairs in our federal system.

The great question here is not whether the postulates of the saving clause are at stake, for in view of Mr. Justice Frankfurter's majority opinion and its footnote 23 they assuredly are. The great question here involved is: *What are the postulates of the saving clause?*

Notwithstanding the great amount of independent research manifest in Mr. Justice Frankfurter's opinion to demonstrate—unnecessarily—the importance of the postulates and how important it is that such postulates be not eviscerated, no research is manifest as to *what those postulates are*.

Mr. Chief Justice Marshall's opinion in *American Ins. Co. v. Canter*, 1 Pet. 511, 544, quoted from on page 10 of the majority opinion herein throws no light thereon. It was, however, decided in 1828, four years following his opinion in *Osborne v. United States Bank*, 9 Wheat. (22 U. S.) 738, 819, and clearly used the word "cases" in the sense expounded in the *Osborne* case and in Mr. Chief Justice Marshall's earlier speech before the House.

It does not support Mr. Justice Frankfurter's footnote 23; and *The Sarah*, 8 Wheat. 391, cited at the conclusion of the quotation on page 10 from *American Ins. Co. v. Canter*, would seem contrary to footnote 23.

Bearing in mind that the decision of the question of jurisdiction under 28 U. S. C. § 1331 was rendered unnecessary when jurisdiction of all claims was sustained on other grounds, it is submitted that part "I(b)" of the majority opinion, and particularly footnote 23 constituting its premise, thus operates to decide by judicial legislation a jurisdictional question of great importance, which should not be thus unnecessarily decided without careful reexamination whether footnote 23—its premise—is sound.

It is respectfully submitted that either part "I(b)" of the majority opinion should be stricken and expunged from the opinion, as dicta and unnecessary judicial legislation, or the whole question of jurisdiction under 28 U. S. C. § 1331, and particularly the soundness of footnote 23, should be reargued.

SECOND: Of greater importance to this petitioner is the majority opinion mandate remanding for further proceedings only against the three American defendants, with a summary judgment on the merits in favor of the fourth defendant, *Compania Trasatlantica*, thereby unjustly depriving petitioner of valuable rights by barring their examination in any court, without their having been tried and without any motion for summary judgment or judgment on the pleadings having been made or entertained below.

This Court, in accordance with 28 U. S. C. § 2106, has and exercises power on remand to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This Court, by Mr. Justice Frankfurter, heretofore has said that "the due administration of justice requires that we should exercise our discretionary power in reviewing cases to 'require such further proceedings to be had as may be just under the circumstances', 28 U. S. C. § 2106; *Honeyman v. Hanan*, 300 U. S. 14, 25" (*Skelly Oil Co. v. Phillips Co.* (1949), 339 U. S. 667, 678). In *Kennedy v. Silas Mason Co.* (1947), 334 U. S. 249, 256-257, also cited by Mr. Justice Frankfurter in the *Skelly Oil* case, the Court cautioned that "summary procedures, however salutary where issues are clear and simple, present a treacherous record for deciding issues of far-flung import".

The majority opinion herein, by Mr. Justice Frankfurter, directs that:

"The judgment of the Court of Appeals is vacated and the cause remanded to the District Court for further proceedings not inconsistent with this opinion."

Even if formal mandate were to issue, the opinion of the Court would constitute a part of the mandate whether or not set out in the mandate, in view of the remand "to the District Court for further proceedings not inconsistent with this opinion" (*Gulf Refining Co. v. United States*, 269 U. S. 125 (1925); *Metropolitan Water Co. v. Kaw Valley Drainage Co.*, 223 U. S. 519, 523 (1912)).

Moreover, under Rule 59, paragraph 3, of the Rules of this Court, the opinion of this Court and its judgment are the mandate when a copy is filed below.

Under Rule 58, paragraph 1, timely petition for rehearing may be filed; and under Rule 59, paragraph 2, it is only the filing of a petition for rehearing which will stay the mandate—which otherwise would become law of the case.

The majority opinion herein, by Mr. Justice Frankfurter, in part "II" rules on the merits to "affirm the dismissal of petitioner's *claims* against Compania Trasatlantica; and in part "III" remands for further proceedings only as to the American defendants, Garcia & Diaz, International Terminal Operating Co., and Quin Lumber Co.

There are a number of reasons why the majority opinion as a mandate would operate unjustly—even to the extent of depriving petitioner of the right to have heard in any court valuable rights and questions which the Court apparently has not even considered or taken into account in rendering a judgment which as a mandate would bar their examination.

These rights and questions should be examined now by this Court on rehearing, or the Court's opinion as a mandate should be amended on rehearing to be without prejudice to their full litigation.

In respect particularly to Compania Trasatlantica the majority opinion poses and deals with a series of artificial questions, to decide the merits by judicial legislation instead of by accurate examination of the facts and application of American law thereto.

The great attention to one jurisdictional question, immaterial to the case, but ruled on 5 to 4, is in marked contrast to ruling summarily that principles applied in a case wholly different, party-wise, factually and territorially, will be applied—most artificially, we submit—without examination either of the different applicable principles occasioned by the difference between the cases, party-wise,

factually and territorially, or of the several most significant Jones Act provisions and Committee and Congressional record of its discussion and enactment, including the Congressional declaration of national policy directly opposite to that summarily adjudged in this Court's majority opinion herein. None of which were argued or considered in the cited case *Lauritzen v. Larsen*, 345 U. S. 571 (1953).

The majority opinion makes point to affirm dismissal on the merits of petitioner's claims against Compania Trasatlantica, whether under the Jones Act or under the maritime law of the United States, stating the question as "the narrow issue, whether the maritime law of the United States *may be applied* in an action *involving* an injury sustained in an American port by a foreign seaman on board a foreign vessel in the course of a voyage beginning and ending in a foreign country," and then summarily deciding the different question whether the law imposes on ships "the duty of shifting from one standard of compensation to another as the vessel *passes the boundaries* of territorial waters".

Thereby a tort in a port, participated in by the agents and employees of four corporations, is by the Court summarily altered to one participated in by the employees of three,—a *part* of the participants on the deck. An action by the injured man against the four corporate participants is by the Court summarily altered to an action against three corporate participants. Evidence of the participation of the fourth—an asset to petitioner in an action against all four corporate participants—becomes summarily an asset of the remaining three defendants in an action against them. This upon the theory that "the maritime law of the United States may (not) be applied" against the alien corporate participant but may be applied against the three American corporate participants, although the agents and employees of all four were participants therein in a port of the United States. This, by also treating the tort as respects the foreign corporation as though only between it and peti-

tioner and the action as though separately and alone against it.

In *Lauritzen v. Larsen*, party-wise and factually, there was involved a foreign seaman suing only a foreign ship-owner for crew negligence causing injury which occurred territorially in foreign waters.

Here, at the time of Romero's injury, not only was the vessel in an American port; it was manned by a miscellany of foreign crew members and American longshoremen and carpenters, with the American agent in charge, and with the foreign crew members doing work which previously was always profitably done by American labor union members. These facts a trial is needed to establish and clarify, and it is not consonant with the requirements of 28 U. S. C. § 2106 to affirm a dismissal as to one of the four participating corporations before the facts, including the extent and nature of participation of all, have been established by trial.

In *Lauritzen v. Larsen*, there had been a full trial.

Here, the majority opinion is in error, factually, even in its recital in footnote 4 that "The answers of some of the respondents also contained motions to dismiss for failure to state a claim upon which relief can be granted." No answer contains any "motion to dismiss." They plead as an alleged "defense" that the complaint fails to state a cause of action. But the record will be searched in vain for any "motion" either to dismiss for failure to state a claim or for summary judgment.

Today, foreign vessels go into the heart of our country, to Toledo, Chicago, Detroit. If notwithstanding tortious conduct participated in by alien crewmen and American laborers aboard ship while at dock, it is to be ruled that "the maritime law of the United States may (not) be applied" against an alien shipowner, any more than if the vessel were in foreign waters, then the welfare of our country as well as our shipping is jeopardized in a manner

that Chief Justice Marshall, Justice Story and this Court hitherto would not have countenanced. We believe that the Court has not appreciated the vast difference between this case and that of *Lauritzen v. Larsen*.

In *Standard Oil Co. v. Anderson*, 212 U. S. 215, 226, where longshoremen employed by a stevedore, and a winchman employed by the shipowner worked together on shipboard, the Court said:

“But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos.”

In *Amador v. A/S J. Ludwig Mowinckels Rederi*, 2 Cir., 224 F. 2d 437, 440, cert. denied 350 U. S. 901, the Court, citing *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, held that longshoremen on board a ship were “pro hac vice members of the crew” (224 F. 2d 440).

Here, whether the longshoremen and carpenters were *pro hac vice* members of the Spanish crew or Romero was *pro hac vice* a longshoreman, while topping the booms under the dangerous labor condition which existed on deck, the situation occasioning the injury was certainly a *pro hac vice* situation, and wholly—we repeat, wholly—different from that involved in *Lauritzen v. Larsen*.

The case, therefore, is not one which under 28 U. S. C. § 2106 can properly be disposed of by summarily holding *Lauritzen v. Larsen* “to preclude the assertion of a claim” against Compania Trasatlantica along with the other three corporate tort feasons here.

The majority opinion refers to *Lauritzen v. Larsen* and this case differing only in that Larsen was injured in Havana and Romero “while temporarily in American territorial waters”, and states that “This difference does not call for a difference in result.”

With the situation existing whereby the miscellany of American laborers and alien crew members was working on the deck, and with negligence on the part of employees of all four corporations, the real facts of the case have neither been recited nor passed on by this Court's majority opinion. With the manifest necessity that "there must be cooperation and coordination, or there will be chaos" (*Standard Oil Co. v. Anderson, supra*), which of the two laws must ordain and enforce that cooperation and coordination and indemnity for its violation? To ask the question is to answer it. The American laborers do not become subject to Spanish law upon boarding the Spanish vessel in an American port to do longshore work. Rather the Spanish shipowner is subject to American law as long as his ship in an American port has aboard her the miscellany of American workmen as well as the crewmen—and especially when the crewmen have been ordered to do work which the American workmen are accustomed to do and wish to do for the profitable wage. As shown by what happened, the maintenance of cooperation and coordination by virtue of American law is essential to order and safety.

It was not necessary here to decide whether American law attaches when the ship crosses the border, and is error to decide the question of liability solely by such a test. It is necessary to determine—and this Court has not considered and determined—whether American law applies while a miscellany of American laborers and alien crewmen are working aboard ship under circumstances rendered dangerous thereby, as here, and one of the miscellany is injured as a result.

The Court's opinions herein, moreover, have not even mentioned vital facts such that American policemen and hospital aids took charge when Romero was injured; that at point of death Romero was taken to an American hospital and there treated for nine months; and that the hospital has not been paid a dime for the treatment.

The majority opinion states that liability would be "an onerous . . . burden." Such a burden is borne by the American merchant marine. The public policy declared by the Jones Act, Section 1, now 46 U. S. C. 861, is as follows:

"it is *hereby* declared to be the *policy of the United States* to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine."

This Court, by its majority opinion, writes an opposite public policy.

The Court has ignored also the significance of the first clause of Jones Act § 33 giving to "Any seaman" *permission to sue*. *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, argued by ex-Senator, later Mr. Justice Sutherland, had emphasized such a permission to sue as indicating that foreign seamen were to be included; and it was he who suggested the model for Jones Act § 33.

These and other features of the Jones Act, argued fully in petitioner's briefs herein, had not been considered by or called to the attention of the Court in the *Lauritzen v. Larsen* case.

It is manifest that the great research and attention expended by the Court upon the question of jurisdiction under 28 U. S. C. § 1331 resulted in the Court's failing to note the great distinctions between this case and that of *Lauritzen v. Larsen*, and that a rehearing is essential for adequate attention thereto.

Finally, if, indeed, the Jones Act is concerned solely with rights of American seamen in the American merchant marine, then *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138, 141-142 (1956) establishes that, since federal law has not preempted the field as respects aliens, State law then can be applied to allow a recovery. The State of New Jersey, where the accident occurred, whose police took

charge of the situation, and one of whose hospitals hospitalized the injured man for nine months and remains unpaid, has a vital interest; and its laws may appropriately be applied. It was New Jersey law which controlled in *Wildenhus' Case*, 120 U. S. 1.

Instead of the case being decided on the merits against petitioner, this Court, under 28 U. S. C. § 2106, should amend its ruling to remand the case to permit petitioner to take such proceedings pursuant to State law as he may be advised. If the Court should hold that in such case jurisdiction at law should be lacking, then, exercising its discretionary powers in such a case, the remand should be for trial as to all respondents in admiralty.

Wherefore, petitioner respectfully prays that a rehearing be granted herein, and that the judgment in favor of respondent, Compania Trasatlantica, on the merits be reversed, and the case be remanded for trial against all respondents. In the alternative, in the event the Court should hold that the case cannot be tried at law as to such respondent, the case should be remanded for trial as to all respondents in admiralty.

Respectfully submitted,

NARCISO PUENTE, JR.,
Counsel for Petitioner,
70 Pine Street,
New York 5, N. Y.

Of Counsel:

SILAS B. AXTELL,
15 Moore Street,
New York 4, N. Y.

CHARLES A. ELLIS,
37 Wall Street,
New York 5, N. Y.

Certificate of Counsel.

SILAS B. AXTELL, counsel for the above named petitioner, does hereby certify that the foregoing petition and application is presented in good faith and not for delay.

SILAS B. AXTELL,
Counsel for Petitioner.